

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

**REPLY COMMENTS OF TIME WARNER CABLE INC.**

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## SUMMARY

A core theme that unites the diverse array of comments filed in this proceeding is that the Internet *is* open and accessible. Consumers generally expect that broadband Internet access service providers will enable them to enjoy any online content, services, and applications of their choosing, and those expectations are consistently being met in the marketplace. Based on this reality, many commenters rightly observe that the rules proposed in the NPRM represent a solution in search of a problem. But those proposals, and the even more radical regulatory wish lists drawn up by several commenters, are much worse than merely unnecessary; they affirmatively threaten to undermine the incentives for investment and innovation that are so critical to the continued vibrancy of the Internet. Indeed, there could hardly be a more striking disconnect between the ambitious goals and proposals set forth in the National Broadband Plan—which necessarily will require a massive infusion of capital by the private sector to boost broadband availability, adoption, and utilization—and the pursuit of vague and overbroad “openness” rules that would jeopardize those vital initiatives.

Commenters supporting new regulation effectively concede the absence of a real-world problem to be solved and instead argue from the premise that providers of broadband Internet access services (and only such entities) should be *presumed* to harm consumers. Under this worldview, broadband Internet access service providers must prove that the new rules would impose undue burdens to justify forbearance from regulation. Of course, that is not the framework established by the Communications Act and the Constitution. To the contrary, if the Commission seeks to adopt rules that limit broadband Internet access service providers’ ability to enter into new business arrangements, to manage their networks, and to exercise their editorial discretion, it must identify appropriate statutory authority and justify its decision based on record evidence demonstrating a real, rather than conjectural, problem. Yet the D.C. Circuit just

invalidated the only jurisdictional theory presented in the NPRM. Members of the pro-regulatory faction began searching for an alternative basis of authority even before the court's ruling, but none of the possibilities has any support in this record. If the Commission remains intent on adopting new rules, it must provide proper notice of its new proposed approach and develop a record to support it. And even if the Commission were able to navigate all of the obstacles associated with that undertaking, it would find that any rules it adopts would remain legally vulnerable in light of the First Amendment rights at stake.

Making matters worse, champions of new regulation wave the banner of “nondiscrimination” in support of rules that *themselves* would be starkly (and impermissibly) discriminatory. Perhaps not surprisingly, Google seeks to exempt itself from the “neutrality” requirements it urges for broadband Internet access service providers, even though Google's business practices involving search rankings, traffic routing, and many other aspects of its services pose a far greater threat to consumers than any arrangement undertaken by a broadband Internet access service provider. What is more surprising is that advocacy groups purporting to represent the interests of consumers are more than willing to give Google and other major application and service providers a free pass. These parties would have the Commission curtail broadband Internet access service providers' freedom to enter into new business arrangements and manage congestion, while ignoring mounting evidence of discriminatory conduct by providers of online services, applications, and content. Such disparate treatment would be wholly unjustified and unlawful, and proponents of such discrimination offer no credible response.

Time Warner Cable Inc. (“TWC”) has urged that, rather than adopt rules that threaten to undercut the paramount interests in expanding broadband availability, adoption, and utilization,

the Commission should retain the policy of vigilant restraint that has served the nation so well. Such an approach offers the best hope of fulfilling the goals set forth in the National Broadband Plan, as it would maintain an environment that fosters investment and innovation at the core of the network as well as at the edge. A diverse group of parties—including many organizations representing the interests of diverse communities and other constituencies for which broadband adoption has been a particular challenge—support this same approach.

While the opening comments present a compelling case for exercising caution, TWC has made a series of recommendations intended to mitigate the most problematic aspects of the NPRM in the event the Commission remains determined to adopt rules. In contrast to TWC's efforts to suggest a possible middle ground in the net neutrality debate, several commenters conceive of the NPRM as a launching pad for even more heavy-handed and intrusive regulation. They would not only maintain the myopic focus on broadband Internet access service providers and retain a strict nondiscrimination requirement (as opposed to a somewhat less troubling prohibition on *unreasonable* discrimination), but they espouse even more untenable restrictions on network management and other legitimate business practices. Such proposals would make a bad problem worse and, if adopted, further distance the Commission from its stated goals in the broadband arena. At a time when spurring additional investment and innovation in the broadband marketplace is a core national priority, the Commission should chart a course that would actually serve those interests by avoiding undue restrictions on providers of broadband Internet access services.

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Time Warner Cable Inc. (“TWC”) hereby submits its reply comments in the above-captioned dockets.

**INTRODUCTION**

A core theme that unites the diverse array of comments filed in this proceeding is that the Internet *is* open and accessible. Consumers generally expect that broadband Internet access service providers will enable them to enjoy any online content, services, and applications of their choosing, and those expectations are consistently being met in the marketplace. Based on this reality, many commenters rightly observe that the rules proposed in the NPRM represent a solution in search of a problem.<sup>1</sup> But those proposals, and the even more radical regulatory wish lists drawn up by several commenters, are much worse than merely unnecessary; they affirmatively threaten to undermine the incentives for investment and innovation that are so critical to the continued vibrancy of the Internet. Indeed, there could hardly be a more striking disconnect between the ambitious goals and proposals set forth in the National Broadband Plan—which necessarily will require a massive infusion of capital by the private sector to boost

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<sup>1</sup> *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52 (rel. Oct. 22, 2009) (“NPRM”).

broadband availability, adoption, and utilization—and the pursuit of vague and overbroad “openness” rules that would jeopardize those vital initiatives.<sup>2</sup> The most recent report on high-speed services (the first compiled using data collected pursuant to the Commission’s reformed reporting requirements) indicates that while broadband competition continues to thrive, some Americans lack sufficient access and many have yet to adopt broadband services. Yet, just as the Commission is urging broadband Internet access service providers to press the accelerator—consistent with Congress’s own objectives—it is inexplicably putting on the brakes.

Commenters supporting new regulation effectively concede the absence of a real-world problem to be solved and instead argue from the premise that providers of broadband Internet access services (and only such entities) should be *presumed* to harm consumers. Under this worldview, broadband Internet access service providers must prove that the new rules would impose undue burdens to justify forbearance from regulation. Of course, that is not the framework established by the Communications Act and the Constitution. To the contrary, if the Commission seeks to adopt rules that limit broadband Internet access service providers’ ability to enter into new business arrangements, to manage their networks, and to exercise their editorial discretion, it must identify appropriate statutory authority and justify its decision based on record evidence demonstrating a real, rather than conjectural, problem. Yet the D.C. Circuit just invalidated the only jurisdictional theory presented in the NPRM. Members of the pro-regulatory faction began searching for an alternative basis of authority even before the court’s ruling, but none of the possibilities has any support in this record. If the Commission remains intent on adopting new rules, it must provide proper notice of its new proposed approach and

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<sup>2</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* (Mar. 16, 2010) (“National Broadband Plan”); *see also Joint Statement on Broadband*, GN Docket No. 10-66 (rel. Mar. 16, 2010) (“Joint Broadband Statement”).

develop a record to support it. And even if the Commission were able to navigate all of the obstacles associated with that undertaking, it would find that any rules it adopts would remain legally vulnerable in light of the First Amendment rights at stake.

Making matters worse, champions of new regulation wave the banner of “nondiscrimination” in support of rules that *themselves* would be starkly (and impermissibly) discriminatory. Perhaps not surprisingly, Google seeks to exempt itself from the “neutrality” requirements it urges for broadband Internet access service providers, even though Google’s business practices involving search rankings, traffic routing, and many other aspects of its services pose a far greater threat to consumers than any arrangement undertaken by a broadband Internet access service provider. What is more surprising is that advocacy groups purporting to represent the interests of consumers are more than willing to give Google and other major application and service providers a free pass. Such parties would have the Commission curtail broadband Internet access service providers’ freedom to enter into new business arrangements and manage congestion, while ignoring mounting evidence of discriminatory conduct by providers of online services, applications, and content. TWC and others have shown that such disparate treatment would be wholly unjustified and unlawful, and proponents of such discrimination offer no credible response.

TWC has urged that, rather than adopting rules that threaten to undercut the paramount interests in expanding broadband availability, adoption, and utilization, the Commission should retain the policy of vigilant restraint that has served the nation so well. Such an approach offers the best hope of fulfilling the goals set forth in the National Broadband Plan, as it would maintain an environment that fosters investment and innovation at the core of the network as

well as at the edge.<sup>3</sup> A diverse group of parties—including many organizations representing the interests of diverse communities and other constituencies for which broadband adoption has been a particular challenge—support this same approach.

While the opening comments present a compelling case for exercising caution, TWC has made a series of recommendations intended to mitigate the most problematic aspects of the NPRM in the event the Commission remains determined to adopt rules. In contrast to TWC’s efforts to suggest a possible middle ground in the net neutrality debate, several commenters conceive of the NPRM as a launching pad for even more heavy-handed and intrusive regulation. They would not only maintain the myopic focus on broadband Internet access service providers and retain a strict nondiscrimination requirement (as opposed to a somewhat less troubling prohibition on *unreasonable* discrimination), but they espouse even more untenable restrictions on network management and other legitimate business practices. Such proposals would make a bad problem worse and, if adopted, further distance the Commission from its stated goals in the broadband arena. At a time when spurring additional investment and innovation in the broadband marketplace is a core national priority,<sup>4</sup> the Commission should chart a course that would actually serve those interests by avoiding undue restrictions on providers of broadband Internet access services.

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<sup>3</sup> See, e.g., National Broadband Plan at 5 (explaining that the National Broadband Plan “describes actions government should take to encourage more private innovation and investment,” one category of which are policies and actions that “foster[] innovation and competition in networks, devices and applications”).

<sup>4</sup> See, e.g., *id.* at xi (identifying the development of policies that “maximize consumer welfare, innovation and investment” as a key way for government to influence the broadband ecosystem); Joint Broadband Statement at 1 (stating that “[c]ontinuous private sector investment” is “critical to ensure vitality and innovation in the broadband ecosystem”).

## DISCUSSION

Below, TWC addresses some of the primary arguments made in the opening round of comments. In Sections I and II, TWC explains that proponents of regulation have failed to justify, as a policy or legal matter, why the Commission should single out broadband Internet access service providers for compliance with the proposed rules. In Section III, TWC reiterates why it is imperative that the Commission preserve such providers' flexibility to invest in their networks and new services, to innovate and experiment with different pricing models and service offerings designed to benefit consumers (including the emerging and important class of managed services), and to employ reasonable techniques to manage traffic on their networks.

### **I. PROPONENTS OF REGULATION FAIL TO MAKE THE CASE FOR GOVERNMENT INTERVENTION.**

TWC and others have explained that the NPRM proposes sweeping rules that, if adopted in their present form, would dramatically restrict the investment and innovation that is essential to the Internet's future success and outlaw a range of practices that would benefit consumers.<sup>5</sup> It does so, however, without demonstrating that such regulation is necessary or even permissible. Parties that support the proposed regulations fail to remedy these fatal shortcomings in the NPRM's approach. At bottom, they appear to assume that regulation should be the default state of affairs and that mandates may be lifted only if broadband Internet access service providers can demonstrate with particularity that they would impose severe harm.<sup>6</sup> But that is not our system

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<sup>5</sup> See *infra* Section III.A; see also, e.g., TWC Comments at 30-35, 53-58; Communications Workers of America ("CWA") Comments at 10-11; CTIA Comments at 4-8; Motorola Comments at 3-9; Free State Foundation Comments at 1; National Organizations (Minority Media and Telecommunications Council) Comments at 19-23; U.S. Chamber of Commerce Comments at 6-7.

<sup>6</sup> See, e.g., Free Press Comments at 43 (claiming that the "burden of proof lies with" broadband Internet access service providers to explain why the Commission should not take steps in this proceeding to ensure investment keeps pace with customers' usage); *id.*

of governance. As a legal and policy matter, the *Commission* has the burden to justify deprivations of private actors' freedom to run their businesses in the interest of their customers and shareholders. Neither the NPRM nor its champions are up to that essential task, leaving the record devoid of any legitimate policy or legal justification for government intervention and its associated harms.

**A. Proponents of Regulation Fail To Identify Any Concrete Problem To Be Solved.**

As TWC and others have explained, conspicuously absent from the NPRM's discussion is any evidence of a genuine problem relating to Internet openness. Indeed, despite the Commission's commitment to seeking "fact-based answers,"<sup>7</sup> proponents of regulation exhibit an unfortunate lack of interest in actual facts. TWC and others have noted that the NPRM mentions only two instances in which it claims Internet openness has ever been threatened, both of which are distinguishable (not to mention quite stale).<sup>8</sup> Moreover, TWC has explained that neither of these examples—Madison River's brief blocking of VoIP ports and Comcast's network management practices (aimed at mitigating congestion caused by peer-to-peer ("P2P") applications)—supports the imposition of sweeping rules that would encompass conduct that was

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at 154-55 (stating that "further detail is needed" regarding how the proposed rules would affect broadband Internet access service providers' future business plans); Google Comments at 37 (claiming that broadband Internet access service providers have failed to show that codification of the rules would lead to diminished investment and overall public harm as the providers claim); PIC Comments at 29-30 (same).

<sup>7</sup> NPRM ¶ 16; *see also* National Broadband Plan at 29 (stating that the Commission and other agencies have many tools to influence competition, and that "[t]hese tools are best applied on a fact-driven, case-by-case basis"); *id.* at 35 (making recommendations to develop "data-driven competition policies for broadband services"); Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, March 2010 Open Agenda Meeting, "A National Broadband Plan for Our Future," Mar. 16, 2010, at 4 (stating "personal appreciation" for the National Broadband Plan's "focus" on "providing real solutions to real problems").

<sup>8</sup> *See, e.g.*, TWC Comments at 19-20, 25-26; Free State Foundation Comments at 4-9; Verizon Comments at 32.

not at issue in either case and entities that were not parties to that proceeding.<sup>9</sup> In fact, the Commission’s decision addressing Comcast’s practices has now been vacated and has no legal effect, depriving the Commission of any toehold from which to expand regulation and requiring that it take a fresh look at the issues it previously considered.<sup>10</sup> In the past, the courts have not hesitated to reject Commission rules premised on evidence as sparse as that presented here.<sup>11</sup> To

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<sup>9</sup> TWC Comments at 25-26.

<sup>10</sup> See *infra* Section II.A.1. TWC previously advised the Commission to use this proceeding to revisit its prior handling of the Comcast case and retract any suggestion that it has banned P2P mitigation techniques. TWC Comments at 26. Now that the D.C. Circuit has vacated the Commission’s prior decision, such reconsideration is not merely advisable, but imperative. Significantly, BitTorrent itself recognizes that its traffic volume can become “so great that it overwhelms end-users’ connections (leading to service calls from consumers whose internet doesn’t work)” —and in response it notes the value of its *own* traffic management techniques, which, like the practices at issue in the *Comcast* case, “automatically slow[] or stop[] BitTorrent transfers before network connections seize up.” Simon Morris, *Changing the game with uTP*, Oct. 5, 2009, <http://blog.bittorrent.com/2009/10/05/changing-the-game-with-%CE%BCtp/>. BitTorrent’s understanding of the importance of slowing down P2P traffic in times of congestion also implicitly recognizes that it is proper to distinguish among various types of traffic in applying network management practices—indeed, those actions demonstrate an understanding that P2P traffic as a class is less sensitive than other types of traffic, given that BitTorrent slows down P2P transmissions to let other traffic take precedence.

Just as these changes in the legal and technical landscape warrant a fresh look at the conduct at issue in the *Comcast* case, they make clear that the recently announced class action settlement under which RCN agreed to refrain from engaging in similar P2P mitigation techniques is not evidence of a problem requiring Commission intervention, as some groups contend. See, e.g., *Just like Comcast? RCN accused of throttling P2P*, <http://arstechnica.com/tech-policy/news/2010/04/just-like-comcast-rcn-accused-of-throttling-p2p.ars> (last visited Apr. 21, 2010). That dispute centered on RCN’s disclosure practices, and it was settled without any finding of wrongdoing. See *id.*

<sup>11</sup> See, e.g., *Cincinnati Bell Tel. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (granting petitions for review of rules that limited the ability of cellular communications providers to bid on new licenses, explaining, “[T]he FCC, rather than showing that *it actually had some factual support for its conclusions*, uses the ‘deference’ standard of review as if it were an ink blotter waiting for this Court’s rubber stamp to validate agency action. Notwithstanding the FCC’s mantra-like incantations of ‘deference,’ we find the record to be insufficient to support the Cellular eligibility rules at issue.”) (emphasis in original); *id.* at 760 (“This Court is certainly not prescient, and we do not demand this from the FCC. What we do demand, however, is that the FCC provide at least some support for its

proceed on the basis of such a thin record would simply invite the same outcome in this proceeding.

Proponents of regulation do not fill the critical evidentiary void left by the NPRM. Despite imploring the Commission to “take action now,”<sup>12</sup> these parties fail to identify any actual harms that require such urgent redress. Free Press—one of the most strident supporters of the proposed rules—observes that “widespread discrimination against traffic is not commonplace in the United States” and bases its constitutional defense of the proposed rules on its view that broadband Internet access service providers do *not* discriminate and instead dutifully transmit *all* data packets on their networks.<sup>13</sup> In its principal comments in this proceeding, Google quite expressly calls on the Commission to regulate *before* any harmful practices arise<sup>14</sup>—not coincidentally, locking in significant advantages for Google in the process. And the self-styled “Public Interest Commenters”—or the “PIC” parties—refer vaguely to “events that have occurred” without naming any of them.<sup>15</sup> More often than not, parties that support regulation tout the current openness and accessibility of the Internet and the many benefits that result,<sup>16</sup>

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predictive conclusions.”); *Century Communications Corp. v. FCC*, 835 F.2d 292, 300 (D.C. Cir. 1987) (rejecting rules where the Commission had “adduce[d] scant evidence for its judgment” of a problem requiring correction through regulation).

<sup>12</sup> Google Comments at i; *see also, e.g.*, PIC Comments at 22; Open Internet Coalition Comments at 12.

<sup>13</sup> Free Press Comments at 76; *infra* Section II.B (noting Free Press’s flawed legal argument that because broadband Internet access service providers generally choose not to exercise editorial discretion today, they are not entitled to First Amendment protection).

<sup>14</sup> Google Comments at 40. In a joint filing with Verizon, however, Google advances the opposite position, arguing that regulatory authorities can safely rely on “market forces and self-governance” and that government “involvement should occur only where necessary on a case-by-case basis.” Verizon/Google Letter at 6.

<sup>15</sup> PIC Comments at 22.

<sup>16</sup> *See, e.g., id.* at 22-30 (describing the open nature of the Internet); Free Press Comments at 9 (attributing the meteoric rise of Internet technology and the value it provides to the

seemingly oblivious to the fact that those marketplace conditions arose in large part because of *minimal* regulation—counseling against adopting new rules now.

Unable to describe any genuine problems that exist today, the NPRM’s supporters—like the NPRM itself—are left to support preemptive regulation by theorizing about *potential* harms that they believe might result from broadband Internet access service providers’ putative bottleneck control and their alleged bad motives. As a general matter, TWC has already explained that such speculation cannot serve as the basis for any rules—and particularly not rules as sweeping and invasive as those proposed here.<sup>17</sup> The Federal Trade Commission (“FTC”) has advised against this very approach, noting “the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace.”<sup>18</sup> This is true even of federal agencies with expertise in the relevant area.<sup>19</sup> Most notably, TWC has explained that in connection with the merger of AOL and Time Warner Inc., the Commission imposed various regulations based on expectations concerning the merged company’s future conduct that proved to be dead wrong, forcing the Commission later to undo its action to avoid further harm to innovation.<sup>20</sup> Other parties—including some proponents of net neutrality

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open nature of the Internet); Open Internet Coalition Comments at 2-9 (citing the Internet’s openness as critical to its success and noting the benefits enjoyed by small businesses and social networking sites); Center for Democracy & Technology Comments at 1 (stating that the Internet’s extraordinary success stems directly from its openness).

<sup>17</sup> TWC Comments at 28-30.

<sup>18</sup> FTC Report at 157; *see also* TWC Comments at 28-29.

<sup>19</sup> *See* Commissioner Meredith Attwell Baker, *Advancing Consumer Interests Through Ubiquitous Broadband: The Need for a New Spectrum*, 62 FED. COMM. L.J. 1, 9 (2010) (stating that “government should be mindful of its limited ability to predict the evolution of this vital economic engine”).

<sup>20</sup> TWC Comments at 35-37 (explaining that, contrary to the Commission’s predictions, AOL did not become dominant in the provision of broadband Internet access and ultimately was forced to exit that business entirely, rendering the Commission’s regulations moot); *Applications for Consent to the Transfer of Control of Licenses and*

today—have demonstrated that they are no more adept at such prognosticating, having urged government intervention to address predictions about the fate of the Internet that completely failed to materialize.<sup>21</sup> The Commission wisely declined to give credence to that alarmism, and its restraint facilitated the tremendous success of broadband in this country thus far—a lesson of special pertinence to this proceeding.

In any event, the speculation offered here lacks any factual or logical basis. For the most part, the proponents of regulation focus their efforts on attempting to put some meat on the bones of the various theories offered by the NPRM, or else, simply repeating those theories without analysis. Most of these parties offer some variant of the proposition that broadband Internet access service providers have market power and a unique “gatekeeper” role that they are likely to exploit in order to protect their other services.<sup>22</sup> The notion that broadband Internet access service providers enjoy bottleneck control unconstrained by market forces has been repudiated by the Commission itself and disproved by evidence presented in several Commission

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*Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee; Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS*, Memorandum Opinion and Order, 18 FCC Rcd 16835 ¶ 12 (2003) (eliminating condition on provision of instant messaging service, finding that it was unnecessary and that removal of the condition “will likely provide public interest benefits” by facilitating the provision of new and innovative competitive services).

<sup>21</sup> TWC Comments at 37 (noting arguments for “open access” mandates); AT&T Comments at 80-81 (quoting various predictions about the “death” of the Internet).

<sup>22</sup> *See, e.g.*, Google Comments at 13, 15 (describing broadband networks as “a general purpose technology (GPT), like electricity or railroads,” and referring to “the unique role of broadband networks as an essential input, a scarce resource, and a means of controlling Internet traffic”); NASUCA Comments at 9 (stating, in reference to broadband Internet access networks, “This is where the bottleneck is; this is where the gatekeepers sit.”); Free Press Comments at 15 (claiming that broadband Internet access service providers are motivated by their desire to insulate their own businesses from disruptive competition); PIC Comments at 24 (arguing that market-based solutions are inadequate because broadband Internet access service providers are incentivized to discriminate against unaffiliated content and services and to monetize scarcity).

proceedings during the past year, including this one.<sup>23</sup> TWC and many others have provided evidence showing that broadband competition—including with respect to broadband Internet access—is robust and growing, leading to enormous benefits for consumers.<sup>24</sup> The National Broadband Plan supports these same points, underscoring the absence of market power among broadband Internet access service providers.<sup>25</sup> The NPRM neither presents nor facilitates a

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<sup>23</sup> See, e.g., TWC Comments at 27 (citing Commission findings of broadband competition).

<sup>24</sup> *Id.* at 8-11; see also, e.g., Net Neutrality Regulation: The Economic Evidence, GN Docket No. 09-191, at 3 (filed Apr. 12, 2010) (declaration submitted by 21 economic scholars, professors, and practitioners, finding that “the evidence demonstrates that broadband markets are highly competitive and rivalrous, and hence not generally susceptible to the types of anticompetitive conduct discussed in the NPRM”); *id.* at 6 (“The evidence before the Commission . . . demonstrates that broadband ISPs, in general, do not possess significant market power vis-à-vis pricing or exclusion . . . .”); U.S. Chamber of Commerce Comments at 7 (“The intense competition between cable operators, phone companies, wireless carriers, and others for broadband customers requires providers to quickly respond to market developments by investing in their networks and developing innovative new products and services. All broadband Internet access service providers manage their networks to ensure that their customers have the best Internet experience possible.”); Free State Foundation Comments at 4 (“Surging Internet usage and data traffic via these evolving, competing platforms evidence a *dynamic* broadband marketplace with increasing consumer choice.”); Cox Comments at 14, 16 (discussing its efforts to assess and implement new technologies to maximize benefits to consumers and keep pace in the competitive marketplace, including the launch of its new competitive wireless service); Verizon Comments at 14-16 (describing the aggressive competition that exists between cable providers, traditional telephone companies, and wireless companies that are moving quickly towards deployment of 4G services, which will lead to even greater cross-platform competition); AT&T Comments at 2-3 (explaining that the broadband marketplace is more competitive now than ever, as evidenced by increased speeds, rapidly growing usage, significantly declining prices on a per-bits-consumed basis, and very substantial customer “churn” rates for both cable and telephone company broadband providers).

<sup>25</sup> See, e.g., National Broadband Plan at 20 (stating that more than 80 percent of people with access to terrestrial, fixed broadband live in markets “with more than one provider capable of offering actual download speeds of at least 4 Mbps”); *id.* (stating that “[b]oth telephone and cable companies continue to upgrade their networks to offer higher speeds and greater capacities,” and that advertised speeds “have grown approximately 20% each year”).

contrary conclusion; in fact, it fails to conduct any empirical examination of the issue, and it does not even offer an analytical framework that would allow someone else to rise to that challenge.<sup>26</sup>

The most recent report on high-speed services, the first such report based on data obtained through the Commission's reformed reporting procedures, confirms these trends in competition.<sup>27</sup> The report found that the number of fixed high-speed Internet connections more than doubled from approximately 40 million in June 2005 to over 100 million in December 2008.<sup>28</sup> In 2008, despite the onset of a recessionary economy, fixed-location high-speed Internet access connections to homes and businesses increased by 10 percent.<sup>29</sup> The 86 million residential high-speed connections as of the end of 2008 represent a wide array of technologies.<sup>30</sup> In addition to the growing range of technologies available, the nationwide number of providers of high-speed connections also increased from 1,270 in June 2005 to 1,554 in December 2008, with dramatic increases in the number of fixed and mobile wireless providers and FTTP providers.<sup>31</sup> While the same report confirms concerns about the extent of the digital divide—yet another consideration that counsels restraint, as TWC has discussed before and again below<sup>32</sup>—

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<sup>26</sup> TWC Comments at 8-11; *see also, e.g.*, Net Neutrality Regulation: The Economic Evidence at 5 (“It is also striking that the NPRM never concludes that broadband ISPs have market power.”); *id.* (“The NPRM’s failure to examine empirically whether broadband ISPs have market power is difficult to understand, since the issue of market power is central to any meaningful assessment of the impact of the proposed rules.”).

<sup>27</sup> *See generally High-Speed Services for Internet Access: Status as of December 31, 2008*, Industry Analysis and Technology Division, Wireline Competition Bureau, Feb. 2010.

<sup>28</sup> *Id.*, Table 1.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 7 (46 percent cable modem, 31 percent DSL, 18 percent mobile wireless subscribers with data plans for full Internet access, 3 percent FTTP, and 1 percent other technologies).

<sup>31</sup> *Id.*, Table 10.

<sup>32</sup> TWC Comments at 33; *infra* Section III.A.3.

this data further confirms that broadband competition is strong and continues to grow. At a bare minimum, there is absolutely no support for the suggestion that there is less competition among broadband Internet access service providers than there was among the historical monopoly telephone companies, yet some parties believe that the former should be subject to greater regulation than the latter.<sup>33</sup>

Further, there is no evidentiary or even theoretical basis to the notion that broadband Internet access service providers will seek to leverage their (non-existent) market power to benefit their other services.<sup>34</sup> The competition noted above is sufficient to ensure that no broadband Internet access service provider will impair the value of its network by unreasonably degrading applications that ride on it, including those with which it may compete. In its joint filing with Verizon, Google appears to agree that market forces will go far toward restraining anti-competitive conduct,<sup>35</sup> although in its principal filing it complains not only that all broadband Internet access service providers are dominant but that they will invariably use their

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<sup>33</sup> Compare, e.g., Google Comments at 61-62 (arguing that broadband Internet access service providers should be subject to a strict nondiscrimination requirement, rather than a prohibition on “unreasonable discrimination,” based on “heightened concerns of anticompetitive conduct”), with TWC Comments at 62-65 (explaining that the nondiscrimination requirement would subject information providers to a stricter discrimination standard than telecommunications service providers).

<sup>34</sup> See, e.g., Google Comments at 28 (“The twin forces of vertical integration and the convergence of formerly separate service offerings enhance the significant financial incentives of last-mile broadband providers to protect and promote their own revenue streams using control over the broadband network conduit at the expense of competitors and users.”); Free Press Comments at 3 (alleging that the “true motive” of broadband Internet access service providers to discriminate is “the protection of legacy voice and video services from the disruptive competition enabled by the open Internet”); PIC Comments at 62 (“As carriers become increasingly integrated with copyright holders and distributors such as MVPDs, their ability to restrain Internet-based methods of content distribution will have increasing appeal if it is not properly contained by the Commission’s regulations.”).

<sup>35</sup> See, e.g., Verizon/Google Letter at 4 (“[T]he Internet community is highly motivated and well positioned to police itself[.]”).

market power for mischief.<sup>36</sup> Putting aside this inconsistency in its advocacy, Google's protests in this regard ring quite hollow. Google is at least as "vertically integrated" as the broadband Internet access service providers about which it complains, and it has gained renown for using its dominance in search to favor its offerings (and discriminate against its competitors) by prioritizing its own services in search results.<sup>37</sup> Although Google warns against broadband Internet access service providers' leveraging their own services, it apparently wants the Commission to look past the fact that Google is guilty of that very conduct.

In fact, concerns about such leveraging in the context of broadband Internet access service providers would have no merit even in the absence of competition, as it is widely understood that all providers (including those with monopoly power) have incentives to maximize the use of their networks in order to enhance their value.<sup>38</sup> It thus is not surprising that the Commission has rejected the proposition that Free Press and others urge on it now, finding it unlikely that broadband Internet access service providers would discriminate in favor of their own competitive services and inviting parties to submit concrete evidence to the contrary—something that no commenter has yet to do.<sup>39</sup> And as noted above, where the Commission has deviated from that approach (such as in the AOL and Time Warner Inc. merger), it was later forced to unwind needlessly burdensome conditions that were grounded in misplaced speculation. Even the founder and president of Public Knowledge recently disagreed with the notion that broadband Internet access service providers would block applications in order to

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<sup>36</sup> Google Comments at 30-31.

<sup>37</sup> *See infra* at 26-27.

<sup>38</sup> *See, e.g.,* Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 104 (2003).

<sup>39</sup> *See, e.g., AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 ¶ 118 (2007).

favor their own services.<sup>40</sup> Finally, even if there were merit to such speculation in this context, the proper response, if any, would be a targeted prohibition on such anti-competitive conduct, not a categorical ban on all commercial arrangements with content, application, and service providers regardless of whether any “vertically integrated” service is even involved.<sup>41</sup>

While the consumer benefits delivered by broadband Internet access service providers are demonstrated by facts, the concerns raised by parties like Free Press and Google are hypothetical and often counter-factual. Indeed, parties that bemoan the absence of competition often prove the opposite point. For example, many of these entities tout the substantial amount of investment that the alleged “monopolists” have undertaken<sup>42</sup>—expenditures they would be less likely to make if they were insulated from competition. Such commenters also laud the many benefits that are available to consumers in the broadband marketplace today,<sup>43</sup> which the FTC and the

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<sup>40</sup> See The Federalist Society, *The FCC’s Authority to Promulgate Internet Traffic Rules*, Mar. 31, 2010 (Gigi Sohn: “I really disagreed with the Martin FCC’s decision saying that Comcast was blocking BitTorrent as a competitive matter. I wasn’t convinced . . . that they were trying to favor their video service and that’s why they blocked BitTorrent.”), [http://www.youtube.com/watch?v=3D43\\_HNhgaE&feature=SeriesPlaylist&p=C321BD35FC7C1E41](http://www.youtube.com/watch?v=3D43_HNhgaE&feature=SeriesPlaylist&p=C321BD35FC7C1E41).

<sup>41</sup> Of course, it should be emphasized that vertical relationships are not themselves anti-competitive, and in fact produce widely recognized benefits. See, e.g., *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1325-26 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (citing cases and scholarship).

<sup>42</sup> See, e.g., Free Press Comments at 26 (citing a report showing billions of dollars spent on and growth in gross capital investments for nearly all major broadband Internet access service providers between 2006 and 2008); *id.* at 42-44 (discussing current levels of investment by broadband Internet access service providers); Google Comments at 8 (stating that “broadband providers have continued to invest tens of billions of dollars in their networks”).

<sup>43</sup> Free Press Comments at 9 (citing examples of the Internet’s many uses and extolling its vast potential); Google Comments at 4-13 (discussing the societal benefits arising from the open Internet); Open Internet Coalition Comments at 2-5 (noting the Internet’s role in facilitating electronic commerce, new technologies, and job creation).

Department of Justice (“DOJ”) have observed are signs of extensive competition.<sup>44</sup> While these commenters cite their desire to preserve such benefits of the Internet as a primary reason for regulation, the benefits are unlikely to have been generated in the first place were there not substantial competition (and an environment conducive to investment). In any event, TWC has explained that if the Commission were inclined to reverse its longstanding findings of broadband competition, it has not offered any mechanism by which to conduct the requisite analysis in this proceeding.<sup>45</sup>

Some parties try to sidestep the inconvenient absence of any “market power” rationale for regulation by arguing for new mandates irrespective of the degree of competition. Perhaps drawing inspiration from the NPRM’s unfounded suggestion that broadband Internet access service providers will act unreasonably even when they face effective competition,<sup>46</sup> these commenters offer up a range of potential theories in the apparent hope that at least one of them will stick. For example, the PIC parties assert that switching costs like early termination fees undermine any disciplining effect of competition by preventing consumers from taking advantage of competitive alternatives; Google repeats the same claim, while simultaneously trying to justify its own early termination fee in the face of a Commission investigation.<sup>47</sup> Several parties gravely note the advent of deep packet inspection and similar technologies, which

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<sup>44</sup> TWC Comments at 11 (citing FTC and DOJ findings).

<sup>45</sup> *Id.* at 27.

<sup>46</sup> NPRM ¶ 97.

<sup>47</sup> PIC Comments at 23-24; Google Comments at 21-22; Letter from Richard S. Whitt, Google Inc., to Joel Gurin & Ruth Milkman, DA No. 10-113 (filed Feb. 23, 2010); Nancy Gohring, *Google reduces its Nexus One termination fee*, Feb. 8, 2010, <http://www.infoworld.com/d/mobilize/google-reduces-its-nexus-one-termination-fee-627> (noting that even after Google reduced its early termination fee for the Nexus One phone, the total fee to cancel service remains the highest return fee in the industry); *infra* at 22 note 65.

they claim provide broadband Internet access service providers with cheaper and more efficient tools for controlling the online experience and warrant government intervention before they “take root.”<sup>48</sup> And Free Press asserts that the “principle of nondiscrimination” and its intended “outcome” of “openness” are simply so important that nondiscrimination rules must be imposed “regardless of how competitive the market is.”<sup>49</sup>

The hypothesized harm based on these considerations is no more reliable a basis for new mandates than the unsupported assertions of market power. For one thing, the record evidence does not bear it out, as TWC has explained. Nor is there any theoretical basis to such concerns. Indeed, these critics fail to recognize that broadband Internet access service providers face numerous countervailing incentives that negate the more sinister motivations attributed to them.<sup>50</sup> Moreover, even assuming that tools like deep packet inspection could be used in a manner that harms consumers’ interests, these commenters overlook the fact that engaging in such conduct would simply alienate a broadband Internet access service provider’s subscribers, and thus would be counter-productive.<sup>51</sup> As a result of such incentives and other factors, the FTC has concluded that “it is not possible, based on generalized data or predictions of future business arrangements, to conclude that the online content and applications market suffers or will

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<sup>48</sup> Google Comments at 32-34; Open Internet Coalition Comments at 14; Free Press Comments at 141; PIC Comments at 2; Dish Comments at 4-5.

<sup>49</sup> Free Press Comments at 45-46.

<sup>50</sup> TWC Comments at 29-30.

<sup>51</sup> See Farrell & Weiser, *supra*, at 101-05 (describing platform providers’ incentives to internalize complementary efficiencies arising from applications created by third parties).

suffer from anticompetitive conduct.”<sup>52</sup> It is unclear what hidden expertise these advocacy organizations have that the FTC lacks to make such predictions.

Finally, the notion that the Commission should now intervene to quash “new” technologies for managing Internet traffic that threaten to “alter the very nature of the Internet” is flawed on several levels.<sup>53</sup> Even apart from the fact that broadband Internet access service providers have strong incentives to give consumers the best possible online experience, such claims ignore the fact that the Internet has long featured prioritized and enhanced services, and such practices are quite prevalent today.<sup>54</sup> The Commission did not see fit to intervene when, for example, content delivery networks (“CDNs”) first emerged, nor did it insert itself into the evolution of the Internet Protocol when fields were developed to enable prioritization of packets.<sup>55</sup> There is no basis now for the Commission to adopt net neutrality regulation in an effort to micromanage—and effectively halt—the development of technologies that serve to enhance the Internet experience for all types of users. As Secretary of State Hillary Clinton recently explained, it is governments, rather than private companies, that pose the greatest risk to

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<sup>52</sup> Federal Trade Commission Internet Task Force, *Staff Report: Broadband Connectivity Competition Policy*, at 125 (June 2007) (“FTC Report”).

<sup>53</sup> PIC Comments at 2; NPRM ¶ 8 (stating that broadband Internet access service providers are “try[ing] new ways of managing congestion on their networks,” including “[t]ools that enable network operators” to prioritize or enhance transmissions, that “have the potential to change the Internet from an open platform . . . to an increasingly closed system”).

<sup>54</sup> See, e.g., Amazon Comments at 2 (“Importantly, we note that the Internet has long been interconnected with private networks and edge caches that enhance the performance of some Internet content in comparison with other Internet content, and that these performance improvements are paid for by some but not all providers of content. The reason why these arrangements are acceptable from a public policy perspective is simple: the performance of other content is not disfavored, *i.e.*, other content is not harmed.”); *infra* Section I.B.1.

<sup>55</sup> See AT&T Comments at 49-50.

Internet openness.<sup>56</sup> Although some parties have misconstrued those remarks as a call for regulation,<sup>57</sup> they also ignore Secretary Clinton’s observation that providing unfettered access to information over the Internet is a sound business priority, meaning that there is no need for government to intervene to try to achieve that result.<sup>58</sup>

Decades ago, one commissioner warned of the agency becoming a “leaning tower of jello,” bending in response to the latest political winds.<sup>59</sup> The Commission implicitly acknowledged that concern in the NPRM by calling for data-driven analyses and “fact-based answers.”<sup>60</sup> Yet the commenters that seek to impose new restraints on broadband Internet access service providers fail to heed that call, substituting rhetoric and speculation for any actual showing of harm. The Commission therefore should decline to adopt new rules and maintain its longstanding and successful policy of vigilant restraint.

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<sup>56</sup> Hillary Rodham Clinton, Secretary of State, *Remarks on Internet Freedom*, The Newseum, Washington, D.C., Jan. 21, 2010, <http://www.state.gov/secretary/rm/2010/01/135519.htm> (“Clinton, *Internet Freedom*”) (describing “the freedom to connect—the idea that governments should not prevent people from connecting to the internet, to websites, or to each other”).

<sup>57</sup> See Free Press, *Free Press Echoes Secretary Clinton’s Call for Internet Freedom*, Jan. 21, 2010, <http://www.freepress.net/node/76174>.

<sup>58</sup> See Clinton, *Internet Freedom* (“For companies, this issue is about more than claiming the moral high ground; it comes down to the trust between firms and their customers. Consumers everywhere want to have confidence that the internet companies they rely on will provide comprehensive search results and act as responsible stewards of their information. Firms that earn that confidence will prosper in a global marketplace. Those who lose it will also lose customers.”); see also *id.* (“Increasingly, U.S. companies are making the issue of internet and information freedom a greater consideration in their business decisions.”).

<sup>59</sup> *American Telephone & Telegraph Co., Long Lines Department*, Memorandum Opinion and Order, 20 F.C.C.2d 383 (1969), Dissenting Opinion of Commissioner Nicholas Johnson.

<sup>60</sup> NPRM ¶ 16.

**B. The Pro-Regulation Arguments Offered by the NPRM’s Supporters Would Require That the Proposed Rules Be Extended Beyond Broadband Internet Access Service Providers.**

The comments submitted by proponents of regulation reflect a fundamental inconsistency. Parties such as Free Press, the PIC parties, and Google support the proposed rules in the purported interest of promoting consumer welfare and advance various broad theories in the hope of persuading the Commission to take action that they assert is critical to the future of the Internet and all those who use it. But they then proceed to argue strenuously for blanket exemptions for many entities that not only have the ability to impact Internet openness but have a track record of actually doing so, leaving them free to inflict harm on the very consumers whose interests these commenters claim to be defending.

It is impossible to reconcile these divergent positions. A diverse group of commenters points out the contradiction inherent in proposing discriminatory rules to combat discrimination. Indeed, the selective proposals advanced by proponents of regulation would condone discriminatory practices by wide swaths of the Internet ecosystem, despite the fact that their arguments offered to justify regulation of broadband Internet access service providers apply equally, if not more so, to a range of other entities.<sup>61</sup> Those arguments are flawed, but if the

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<sup>61</sup> See, e.g., TWC Comments at 38-41, 73-98; National Organizations (Minority Media and Telecommunications Council) Comments at 28-29 (stating that “a reasonable case has been made that any argument the Commission advances for applying net neutrality rules to broadband providers could apply with even more force to certain content, applications, and service providers—entities that have both the ability and a demonstrated willingness to shape the Internet experience of all consumers, including minorities, in some decidedly un-neutral ways”); CWA Comments at 12 (“By making the proposed rules binding on broadband Internet access service providers alone, and not on other key Internet ecosystem players such as dominant application, service, and content providers, Internet users and consumers would not be fully protected.”); Sandvine Comments at 7-9 (listing several problems with singling out network providers and stating that “the Internet exists to serve subscribers, so framing rules in terms of subscribers’ needs is entirely appropriate,” and that “all stakeholders in a commons need to work cooperatively to

Commission nonetheless decides to credit them, it cannot selectively and arbitrarily invoke the “openness” principles to justify regulation of broadband Internet access service providers alone. Such an approach would increase the risk of harms posed by the proposed rules as well as their already substantial legal vulnerabilities.

**1. Conduct by Entities Other Than Broadband Internet Access Service Providers Is More Threatening to the Stated Regulatory Objectives of This Proceeding.**

Fundamentally, parties supporting the NPRM’s myopic approach ignore the substantial evidence showing that broadband Internet access service providers may be the only industry players that are *not* actively engaging in the type of conduct that the NPRM appears to target. TWC and others have described numerous examples of conduct by application and service providers, CDNs, backbone providers, and content providers that would appear to be inconsistent with the strict nondiscrimination mandate suggested in the NPRM.<sup>62</sup> Google has railed against the prospect of consumers not being able to access the online content and services they want, while maintaining that there is no legitimate basis for regulating Google itself.<sup>63</sup> Yet TWC and others have explained at length that Google’s ever-growing empire and expanding activities put consumers at risk of such harms—which should put Google in the net neutrality spotlight.<sup>64</sup> In fact, Google recently drew significant press attention as well as a congressional call for an FTC investigation for certain practices that some consumers found objectionable in connection with

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maintain its health long term, and, conversely, none should be singled out to guarantee its adherence to core principles”).

<sup>62</sup> See generally TWC Comments at 73-94; AT&T Comments at 32-33; CWA Comments at 13-14; OPASTCO Comments at 4-5; Verizon Comments at 129-30.

<sup>63</sup> Google Comments at 83-85.

<sup>64</sup> TWC Comments at 74-86; Verizon Comments at 129-30; AT&T Comments at 14.

new service offerings, which it was then forced to correct.<sup>65</sup> Apart from showing the power of the marketplace to address any provider's missteps in the broadband arena, these incidents illustrate that Google's self-appointed role as a champion of "openness" should not obscure its decidedly non-neutral business conduct.

In addition to the examples TWC already has cited, Google has blocked access to its YouTube service from Internet-enabled set-top boxes<sup>66</sup>—at least, those devices sold by vendors that fail to enter into Google's high-priced advertising arrangements.<sup>67</sup> It did so while simultaneously and ironically boasting in its comments that "consumers increasingly are able to search and access the content, video and applications of their choice, through web services *such as YouTube . . .*, using a variety of devices, *including . . . television sets.*"<sup>68</sup> Apart from frustrating the Commission's stated goal of encouraging multichannel video programming distributors to integrate Internet connectivity into their set-top boxes<sup>69</sup>—an arena in which

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<sup>65</sup> Letter from Joe Barton *et al.*, to The Honorable Jon Leibowitz, Chairman, Federal Trade Commission (Mar. 25, 2010); *see also, e.g.*, Hibah Yousuf, *Google Alters Buzz After Privacy Complaints*, CNNMoney.com, Feb. 15, 2010, [http://money.cnn.com/2010/02/15/technology/Google\\_Buzz\\_privacy/index.htm](http://money.cnn.com/2010/02/15/technology/Google_Buzz_privacy/index.htm) (noting the barrage of privacy complaints made immediately after the release of Buzz—Google's answer to Facebook and Twitter—and the numerous consumer demands that it be altered to eliminate the privacy intrusions); Joelle Tessler, *Google Cuts Fee to Break Nexus One Contract*, N.Y. TIMES, Feb. 8, 2010 (reporting that Google's decision to lower its "equipment recovery fees" for customers who break contracts for its Nexus One phone came amid a Commission inquiry); James Temple, *Consumer Group to Call for Google Break Up*, S.F. CHRON., Apr. 20, 2010 (reporting plans of Consumer Watchdog to ask DOJ to launch an antitrust action against Google).

<sup>66</sup> Richard Lawler, *YouTube Pulls a Hulu—Yanking API Access from Popcorn Hour*, ENDGADGET, Nov. 20, 2009, <http://www.engadget.com/2009/11/20/youtube-pulls-a-hulu-yanking-api-access-from-popcorn-hour-ot/>.

<sup>67</sup> AT&T Comments at 32-33.

<sup>68</sup> Google Comments at 27 (emphasis added).

<sup>69</sup> *See* Public Notice, *Comment Sought on Video Device Innovation*, GN Docket Nos. 09-47 *et al.* (rel. Dec. 3, 2009).

Google has advocated selective mandates as well<sup>70</sup>—Google’s blocking runs afoul of the Commission’s Internet openness principles that users be allowed to access lawful Internet content and to run applications and services of their choice.

While Google is particularly prominent, it is not alone, as other titans in this space—including Amazon (through its walled-garden Kindle offering), Facebook (through its blocking of applications), and Disney (through limitations it places on access to ESPN360), among others—likewise do not treat all content, applications, and services “in a nondiscriminatory manner.”<sup>71</sup> New examples of similar practices continue to emerge. Last month, several businesses filed a lawsuit against the online review site Yelp, alleging that it discriminates in favor of companies that advertise on the site by placing positive reviews ahead of negative ones (and threatening to reverse that order for companies that do not pay to advertise).<sup>72</sup>

Perhaps the most compelling illustration of the striking disconnect between the conduct that is actually occurring in the marketplace today and the NPRM’s unjustifiably narrow focus on broadband Internet access service providers is the increasingly prominent debate surrounding Apple’s business practices. Most notably, Apple has designed its iPhone, and now its iPad, with technological measures that prevent consumers from using any applications on those devices except for those obtained from Apple.<sup>73</sup> In addition, Apple prevents access to certain applications it determines to be objectionable; in fact, it has been criticized for the non-

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<sup>70</sup> Comments of Google Inc., NBP Public Notice #27, GN Docket Nos. 09-47 *et al.*, at 12 (filed Dec. 22, 2009) (advocating restrictions on “broadband network owners” in the video device context).

<sup>71</sup> *See generally* TWC Comments at 87-93.

<sup>72</sup> Michael S. Rosenwald, *Reputations at Stake, Companies Try to Alter Word of Mouth Online*, WASH. POST, Mar. 29, 2010.

<sup>73</sup> *See, e.g.*, Yukari Iwatani Kane, *Breaking Apple’s Grip on the iPhone*, WALL ST. J., Mar. 6, 2009.

transparent screening process it employs for iPhone applications, which leads to subjective decisions that allegedly erect barriers to the development of software consumers may want.<sup>74</sup>

Apple has attracted further attention by changing the rules that outside programmers must follow in developing applications for Apple devices, which include requiring them to use Apple programming tools.<sup>75</sup>

Together, these restrictions constitute the sort of closed system that the NPRM appears to target—in short, Apple prevents users of the iPhone and iPad from accessing all applications and lawful Internet content of their choice, while charging a toll to permitted application providers. Nevertheless, these Apple products have been wildly successful and beneficial for consumers, as

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<sup>74</sup> Jenna Wortham, *Apple Purges Blue Apps from Online Store*, N.Y. TIMES, Feb. 23, 2010; Eric Pfanner, *Publishers Question Apple's Rejection of Nudity*, N.Y. TIMES, Mar. 15, 2010; Laura McGann, *Mark Fiore can win a Pulitzer Prize, but he can't get his iPhone cartoon app past Apple's satire police*, NIEMAN JOURNALISM LAB, Nieman Foundation, Harvard University, Apr. 15, 2010 (noting Apple's practice of rejecting content that "in Apple's reasonable judgment may be found objectionable, for example, materials that may be considered obscene, pornographic, or defamatory"); Ryan Chittum, *It's Time for the Press to Push Back Against Apple*, COLUMBIA JOURNALISM REV., Apr. 15, 2010, [http://www.cjr.org/the\\_audit/its\\_time\\_for\\_the\\_press\\_to\\_push.php](http://www.cjr.org/the_audit/its_time_for_the_press_to_push.php) (same); Brian Stelter, *A Pulitzer Winner Gets Apple's Reconsideration*, N.Y. TIMES, Apr. 17, 2010.

<sup>75</sup> Wortham, *supra*; see also *id.* (noting that these changes "leave many start-ups and apps developers in limbo, waiting to find out whether their businesses, many of which have built a substantial clientele and taken money from venture capitalists, can still operate under the new rules," and that some such entities "may have to rethink [their] business model[s]"). In addition, Apple has spurred criticism by refusing to support Flash (which according to one estimate generates 75 percent of the video on the Internet) as well as music encoded in Microsoft's competing Windows Media Audio format, thus forcing users to access content and features through Apple's iTunes and preventing them from using online content in competing formats. See, e.g., Philip Elmer-DeWitt, *Why Is Steve Jobs Flash-obsessed?*, Feb. 19, 2010, <http://brainstormtech.blogs.fortune.cnn.com/2010/02/19/why-is-steve-jobs-flash-obsessed/>; David Kravets, *Updated iPods Confirm Apple's Monopoly, Lawyers Say*, WIRED, Sept. 7, 2007, available at [http://www.wired.com/gadgets/portablemusic/news/2007/09/wma\\_apple](http://www.wired.com/gadgets/portablemusic/news/2007/09/wma_apple).

Apple has noted.<sup>76</sup> That success argues powerfully in favor of a regulatory approach that allows consumers, rather than the government, to determine just how much “openness” or “neutrality” they really want.

The NPRM’s effort to make that decision for consumers is not just ill-advised, but untenably inconsistent. Under the proposed rules, even though Apple’s rejection of “openness” affects many millions of consumers, and even though broadband Internet access service providers have not engaged in any remotely comparable practices, the conduct of broadband Internet access service providers *alone* would be regulated. As TWC and others have explained, singling out broadband Internet access services for scrutiny simply makes no sense. Indeed, if a broadband Internet access service provider emulated Apple’s practices of limiting access to certain types of sites (such as those involving pornography), or requiring third-party applications to be purchased through a proprietary channel, the outcry from the groups supporting the proposed rules likely would be deafening, as the furor over Comcast’s P2P mitigation practices (which was far more modest in scope and impact) illustrates. Yet these same groups appear not to notice that the very types of practices they seek to outlaw are integral to Apple’s breathtakingly popular Internet access devices.

Apple has defended its limitations on third-party applications by warning against the “undesirable consequences” of allowing such applications to be run on its platform—including the risk of diminished investment and consumer welfare.<sup>77</sup> It also has opposed government

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<sup>76</sup> See, e.g., MG Siegler, *Steve Jobs Reiterates: “Folks who want porn can buy an Android phone,”* TECHCRUNCH, Apr. 19, 2010, <http://techcrunch.com/2010/04/19/steve-jobs-android-porn/>.

<sup>77</sup> Responsive Comment of Apple Inc., Docket No. RM 2008-8, at 2, 10 (U.S. Copyright Office Dec. 1, 2008) (opposing efforts that would establish a right to circumvent restrictions in order to use third-party applications, a practice sometimes referred to as “jailbreaking”).

intervention that would result in the “economic restructuring of business models”—in particular, when the result is “assume[d]” to be “a more socially desirable business model that is more ‘open.’”<sup>78</sup> TWC shares Apple’s concerns about unwarranted governmental interference with business models backed by private risk capital. But the inescapable reality is that there is no basis for concluding that “non-neutral” practices at the heart of the Internet ecosystem are not harmful to consumers when undertaken by Apple and various other entities, but would suddenly justify regulatory intervention if broadband Internet access service providers were responsible. As explained above, any assertion that broadband Internet access service providers warrant differential treatment because they possess market power is devoid of any record support; to the contrary, there is significant competition among such providers, as the Commission has consistently found.<sup>79</sup> Likewise, as discussed immediately below, there is no basis for excusing such entities from regulation in light of concerns like those raised by Apple, but then ignoring those same considerations as applied to broadband Internet access service providers.

## **2. Supporters of Regulation Fail To Justify Disparate Treatment for Broadband Internet Access Service Providers.**

As discussed above, proponents of regulation demonstrate a clear preference for unsupported speculation over actual concrete data. But if the Commission endorses their hypotheses, it cannot limit them to broadband Internet access service providers. For instance, if “bottleneck control” were to be a trigger for regulation in this context, Google should be first in line to comply with any rules. Search—one of the most popular Internet applications—is more

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<sup>78</sup> *Id.* at 2-3.

<sup>79</sup> *See supra* at 10-17. If the Commission were to determine that market power (and an attendant threat of harm to consumers) justifies imposing “openness” mandates, then it should expressly condition the application of such rules on an empirical finding of such market power and should apply the restrictions to *any* provider of applications, services, or content found to possess market power, rather than focusing on irrelevant concepts such as the Internet “layer” on which a particular class of entities operates.

highly concentrated than broadband Internet access, with Google maintaining a dominant position that has enabled it to engage in a host of well-documented anti-competitive practices. One of Google's few competitors, Foundem, recently filed comments with the Commission setting forth substantial data demonstrating how Google leverages its dominance in search to market its other services, favoring its own services over those of its competitors.<sup>80</sup> The same allegation has been made by others as well, and is now the subject of a European Union investigation.<sup>81</sup> And a substantial body of academic commentary shows that Google enjoys enormous market power and control through its domination of search, enhanced by the extremely high cost of building a search engine index and Google's role as a gatekeeper to information.<sup>82</sup>

In this regard, Google acts as if it is blissfully unaware of its own role.<sup>83</sup> Whether through its dominance of search (and its non-neutral search prioritization), its collocation and edge-caching proposals intended to "create a fast lane for its own content,"<sup>84</sup> its blocking of

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<sup>80</sup> See generally Comments of Foundem, GN Docket No. 09-191 (filed Feb. 24, 2010).

<sup>81</sup> See Thomas Catan *et al.*, *EU Opens Google Antitrust Inquiry*, WALL ST. J., Feb. 25, 2010 (describing claims filed by Foundem, Ejustice.fr, and Ciao, asserting that Google's dominance in search has produced anti-competitive results).

<sup>82</sup> See, e.g., Wolfgang Schulz, Thorsten Held & Arne Laudien, *Search Engines as Gatekeepers of Public Communication: Analysis of the German Framework Applicable to Internet Search Engines Including Media Law and Antitrust Law*, 6 GERMAN L.J. 1419 (2005).

<sup>83</sup> Compare, e.g., Google Comments at i ("Unlike the rest of the Internet community, broadband networks constitute the essential gateways that stand between users and everything else on the Internet.") and *id.* at 24 ("Broadband providers are uniquely positioned to control Internet traffic through their privileged status in the overall architecture of the Internet."), with Jia Lynn Yang & Nina Easton, *Obama & Google (a love story)*, FORTUNE, Oct. 26, 2009, available at [http://money.cnn.com/2009/10/21/technology/obama\\_google.fortune/index.htm?section=magazines\\_fortune](http://money.cnn.com/2009/10/21/technology/obama_google.fortune/index.htm?section=magazines_fortune) ("If Google delivers a search result in the top position, we click on it. If it's buried, the site might as well not exist.").

<sup>84</sup> Vishesh Kumar & Christopher Rhoads, *Google Wants Its Own Fast Track on the Web*, WALL ST. J., Dec. 15, 2008, at A1.

certain applications and content under its control, or other practices, Google has the ability and incentive to act as a gatekeeper to the online experience, and it has even trumpeted that fact.<sup>85</sup> It does so using its own broadband infrastructure, surely bringing it within the Commission's subject-matter jurisdiction over "all persons engaged" in "communication by wire or radio" (despite Google's denial of that fact).<sup>86</sup> If "the open Internet discussion" truly is about "the freedom to go to the legal content of your choice" and "getting a shot at actually being heard" as Commissioner Copps recently stated, Google must be subject to whatever regulatory constraints are deemed necessary for others.<sup>87</sup>

Likewise, if regulation is required to ensure proper scrutiny of new Internet technologies as some have suggested,<sup>88</sup> broadband Internet access service providers hardly deserve special treatment. In arguing for regulation because "sophisticated tools are providing broadband providers with increasingly fine-grained control over what users do online,"<sup>89</sup> Google again displays a stunning lack of self-awareness. The same rationale applies far more powerfully to Google and its own technologically advanced network practices, including its proprietary and non-transparent search result prioritization, server collocation proposals, and other business conduct that betrays the vision of "neutrality" Google seeks to foist on others. Given the asymmetry of information regarding search engine algorithms and the "enormous harms" caused

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<sup>85</sup> Jonathan Rosenberg, *From the Height of This Place*, The Official Google Blog (Feb. 16, 2009), <http://googleblog.blogspot.com/2009/02/from-height-of-this-place.html> ("We won't (and shouldn't) try to stop the faceless scribes of drivel, but we can move them to the back row of the arena.").

<sup>86</sup> Google Comments at 84 (citing 47 U.S.C. § 152(a)).

<sup>87</sup> FCC Commissioner Michael J. Copps, Remarks to the Joint Center for Political and Economic Studies, Media and Technology Policy Forum, National Press Club, Washington, D.C., at 2 (Mar. 3, 2010).

<sup>88</sup> *See supra* at 16-17.

<sup>89</sup> Google Comments at ii.

“by controlling the process matching users and content providers” to “create winners and losers within these communities,”<sup>90</sup> the threats associated with Google’s conduct easily outstrip whatever harms Google believes broadband Internet access service providers pose.

While the PIC parties and others tout the importance of nondiscrimination to ensure equal opportunity for every idea and to lower traditional barriers to full political engagement and economic participation,<sup>91</sup> that rationale applies to entities like Google first and foremost. TWC has explained that discrimination and search prioritization by Google can render companies and individuals invisible on the web, a fact that Google itself has not only acknowledged but bragged about, as noted above.<sup>92</sup> But Google is not alone. Service enhancements by companies such as Akamai and blocking by companies like Disney have a comparable or greater impact on providers of content and applications than any business practices undertaken by broadband Internet access service providers.<sup>93</sup>

Parties like Free Press look to the Commission’s *Computer Inquiry* decisions to support their view that application and content providers, unlike infrastructure and basic transmission service providers, have always been intentionally walled off from regulation and should continue

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<sup>90</sup> James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007) (arguing for the need for transparency requirements to apply to search engines); *see also* Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 9 YALE J.L. & TECH. 124 (2006); Nico van Eijk, *Search Engines: Seek and Ye Shall Find? The Position of Search Engines in Law*, in IRIS PLUS: LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY (2006).

<sup>91</sup> PIC Comments at 24-28; Google Comments at 11-12; Open Internet Coalition Comments at 10-12; Free Press Comments at 134-36.

<sup>92</sup> TWC Comments at 78-79.

<sup>93</sup> *Id.* at 90.

to be.<sup>94</sup> But this argument mischaracterizes that history and its relevance today. Cable modem operators like TWC, no less than “edge” providers, have always been free from “nondiscrimination” requirements; in fact, the Commission expressly declined to extend the *Computer Inquiry* regime to them and was upheld by the Supreme Court in doing so. If Free Press is granting historical-based exemptions from the proposed rules, then TWC and all other cable operators are entitled to one as well. Of course, application and service providers during the *Computer Inquiry* era did not have the same ability as they do today to act as bottlenecks themselves, in terms of their control over what other applications and services can be used. This evolution in their ability to control the Internet experience is reflected in the fact that the Commission’s *Internet Policy Statement*, which these parties seek to codify into binding rules, applies without limitation to *all* participants in the Internet ecosystem: The Commission recognized that the principles at stake were relevant not only for broadband Internet access service providers, but also for “application and service providers, and content providers.”<sup>95</sup> Entities such as the Open Internet Coalition and Google are simply wrong when they claim otherwise.<sup>96</sup>

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<sup>94</sup> Free Press Comments at 133; PIC Comments at 7-13; Google Comments at 86-87 & n.260.

<sup>95</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986 ¶ 4 (2005) (“*Internet Policy Statement*”); TWC Comments at 38-39.

<sup>96</sup> Open Internet Coalition Comments at 85 (arguing that these principles were only intended to apply to broadband Internet access service providers); Richard Whitt, *Response to AT&T’s Letter to FCC on Google Voice*, Sept. 25, 2009,

In addition, the notion that broadband Internet access service providers can be so neatly cabined off ignores the blurring of formerly distinct lines between service categories—even assuming (against the facts) that layers matter when the stated concern is Internet openness. As TWC has discussed, Google’s global transmission network and server-collocation proposals, for example, belie the simplistic distinction between online providers of content, applications, and services, on the one hand, versus providers of transmission and information processing, on the other.<sup>97</sup> One recent report found that Google handles more Internet traffic than all but two of the world’s broadband Internet access service providers.<sup>98</sup> In fact, Google has quite expressly begun to provide functions normally reserved for broadband Internet access service providers, such as its recently introduced public Domain Name System (“DNS”) resolver service,<sup>99</sup> and a test version of its own broadband Internet access service.<sup>100</sup> As a leading scholar has explained, while it was initially unproblematic to impose regulatory regimes based on the transmission technology utilized for different types of communications, such mechanical distinctions between different technologies, as opposed to the function and service provided, make little sense now, as these traditional boundaries are becoming increasingly blurred.<sup>101</sup> This unitary view of the

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<http://googlepublicpolicy.blogspot.com/2009/09/response-to-at-letter-to-fcc-on-google.html> (“The FCC’s open Internet principles apply only to the behavior of broadband carriers—not the creators of Web-based software applications.”).

<sup>97</sup> TWC Comments at 75-76.

<sup>98</sup> Cade Metz, *The tier 1 network that isn’t*, THE REGISTER, Mar. 17, 2010, available at [http://www.theregister.co.uk/2010/03/17/the\\_size\\_of\\_the\\_googlenet/](http://www.theregister.co.uk/2010/03/17/the_size_of_the_googlenet/).

<sup>99</sup> TWC Comments at 75.

<sup>100</sup> Minnie Ingersoll & James Kelly, *Think Big with a Gig: Our Experimental Fiber Network*, Feb. 10, 2010, <http://googleblog.blogspot.com/2010/02/think-big-with-gig-our-experimental.html>.

<sup>101</sup> Christopher S. Yoo, *The Convergence of Broadcasting and Telephony: Legal and Regulatory Implications*, 1 COMM’NS & CONVERGENCE REV. 44 (2009); see also NPRM, Statement of Commissioner Robert M. McDowell, Concurring in Part,

Internet is reflected in Secretary Clinton’s recent remarks on Internet freedom, which noted the importance of a “single Internet” that allows access to ideas and expression.<sup>102</sup>

If the interest at stake really is Internet openness, the scope of any new rules should be based on the ability to impact Internet openness and on actual observed conduct, not an arbitrary distinction between so-called “last mile” providers and other entities that likewise can impact consumers’ online experience. The Commission has often recognized that the “siloed” approach to regulating formerly distinct categories of communications services is obsolete;<sup>103</sup> it would make no sense to reintroduce a new set of silos in this context. Moreover, as discussed above, the incidents in which Internet openness is being threatened are not occurring at the “physical layer” at all, but in connection with the services provided to end users. Thus, even if it were possible to carve up the Internet ecosystem into different silos and subject each to unique regulatory treatment, the physical layer is the one where regulation is least warranted.

Individual companies offer a range of self-serving reasons why they should not be subject to regulation, but again, their defenses apply equally to broadband Internet access service providers. For example, Akamai contends that it should not be subject to the proposed rules because, unlike broadband Internet access service providers, Akamai only provides services that

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Dissenting in Part, at 98 (“Constructive public policy should subscribe to the philosophy that unfettered innovation should be encouraged equally at all points of the network—at the edge and in the core. As a practical matter, it is fast becoming impossible to separate the two.”).

<sup>102</sup> See Clinton, *Internet Freedom*, *supra*.

<sup>103</sup> See, e.g., *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 ¶ 35 (2004); *Consumer Information and Disclosure*, Notice of Inquiry, 24 FCC Rcd 11380 (2009), Statement of Commissioner Michael J. Copps at 11407 (“The Digital Age is a time of communications convergence wherein voice, video and broadband services are more and more intertwined.”).

improve end-user access.<sup>104</sup> Of course, broadband Internet access service providers such as TWC would make the very same claim. And if prioritization and service enhancements for hire constitute impermissible discrimination, as the NPRM appears to posit, then CDNs should be treated no differently than broadband Internet access service providers. Indeed, Akamai improves access only for *some* end users and for *some* Internet content.<sup>105</sup> This paid-for prioritization is the same type of conduct the Commission and encouraging commenters seek to prevent broadband Internet access providers from engaging in; it cannot serve as a defense against regulation of CDNs unless that rationale is deemed valid more broadly.<sup>106</sup> Netflix argues that the rules are needed only to curb broadband Internet access service providers and not companies like Netflix, because the former alone have the means to employ technology to “change the historically open nature of Internet.”<sup>107</sup> But as discussed, broadband Internet access service providers cannot be distinguished on this basis. By the same token, BitTorrent—despite its prominent opposition to broadband Internet access service providers’ network management techniques in years past—recently acknowledged that it utilizes such practices *itself* in order to

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<sup>104</sup> Akamai Comments at 15-16.

<sup>105</sup> TWC Comments at 89-90.

<sup>106</sup> Free Press seems to believe that the proposed rules at once ban CDN services and permit them. *Compare* Free Press Comments at 128 (“CDN services give cached content ‘priority’ over all other content as a matter of geography and physics (the speed of light). Nothing at all in the proposed rules would prohibit CDNs and local caching services; indeed, such services are a more cost-effective and non-discriminatory way of achieving improved QoS on certain types of content.”), *with id.* at 5 (“In crafting the open Internet policy framework, the Commission must establish a clear, unambiguous rules against all discrimination. . . . While paid-prioritization is a particularly harmful form of discrimination, any application bias poses a great threat to the long-term health of the innovation economy.”).

<sup>107</sup> Netflix Comments at 3.

mitigate network congestion to consumers' benefit.<sup>108</sup> BitTorrent thus recognizes that P2P traffic poses particular challenges, and TWC applauds BitTorrent for taking responsibility for the adverse impacts of its P2P traffic on consumers.

In addition to these strained attempts to explain why service, application, and content providers are different from broadband Internet access service providers, many of these same parties advance various policy reasons why the proposed rules should not be applied even-handedly. But their arguments for restraint with respect to application, content, and service providers apply equally to broadband Internet access service providers. For example, Free Press asserts that Section 230(b) expresses a clear congressional intent for the competitive "Internet"—but *not* the companies that provide Internet access services over telecommunications facilities—to remain unregulated.<sup>109</sup> That argument reflects a profoundly mistaken view that broadband Internet access service providers' networks are somehow not part of the Internet itself,<sup>110</sup> a

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<sup>108</sup> Stephen Lawson, *Broadband Has No Regulator, BitTorrent CEO Says*, IT WORLD, Apr. 19, 2010, <http://www.itworld.com/internet/105124/broadband-has-no-regulator-bittorrent-ceo-says> (describing BitTorrent's Micro Transport Protocol); *see also* Simon Morris, *Changing the game with uTP*, Oct. 5, 2009, <http://blog.bittorrent.com/2009/10/05/changing-the-game-with-%CE%BCtp/> (describing BitTorrent tool that "automatically slow[s] or stop[s] BitTorrent transfers before network connections seize up").

<sup>109</sup> Free Press Comments at 129.

<sup>110</sup> *See, e.g.*, PIC Comments at 6 ("The proposed rules focus on preserving users' access to the Internet, not on 'regulating the Internet' in terms of the content, services, or applications made available thereon."); NASUCA Comments at 9 ("Although the physical layer is not 'the Internet,' the latter depends on the former."); Free Press Comments at 155 ("Net Neutrality detractors have long stated that the FCC will be 'regulating the Internet.' Of course, this argument fails to recognize that the business of the entities in question is to provide Internet *access*. Internet access is information services provided via telecommunications, but content and applications hosted on web servers or uploaded by individual users is the 'Internet.'"); Open Internet Coalition Comments at ii (stating that the broadband Internet access service providers "provide the on-ramps and off-ramps to the Internet"); Amy Schatz, *FCC Chairman on What It Means to Regulate the Internet*, WALL ST. J., Feb. 9, 2010 (quoting Chairman Genachowski as saying, "I don't see any circumstances where we'd take steps to regulate the Internet

notion that proponents of regulation appear to have devised solely for purposes of this proceeding to give themselves comfort that they are not running afoul of the statute.<sup>111</sup> Indeed, the statute includes no such distinction, instead defining the “Internet” as the “international computer network of both Federal and non-Federal interoperable packet switched data networks.”<sup>112</sup> Similarly, the Commission—including in the NPRM—and even some parties who embrace this false distinction have consistently defined the Internet broadly as a “network of networks” encompassing backbone providers and Internet access service providers, rather than the content and services that are available over those networks.<sup>113</sup> Thus, contrary to claims that

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itself. I’ve been clear repeatedly that we’re not going to regulate the Internet.”). While prior Chairmen have uttered the same words, they did not lend them this same narrow meaning. See, e.g., *Remarks by William E. Kennard, Chairman, FCC, Before Legg Mason: A Stable Market, a Dynamic Internet* (Mar. 11, 1999) (responding to claims that “the FCC is going to take all those old phone regulations and dump them on the Internet” by saying, “[A]s long as I am chairman of the FCC, we will not regulate the Internet.”).

<sup>111</sup> See Professor Glen O. Robinson, *Regulating Communications: Stories from the First Hundred Years*, George Mason School of Law Information Economy Project “Big Ideas About Information” Lecture Services, Feb. 18, 2010, at 15-16 (“Robinson, *Regulating Communications*”) (“The FCC seems to regard the Internet ‘itself’ as some disembodied essence that is separate from the physical networks and infrastructure that sustains it—rather in the manner of graphic depictions of the Internet as an amorphous cloud in which information flows in some undefined manner. . . . What the FCC does here is to take advantage of a general public vagueness about the dimensions of the Internet order to define it to accommodate its regulatory objectives.”).

<sup>112</sup> 47 U.S.C. § 230(f)(1).

<sup>113</sup> See, e.g., NPRM ¶ 17 (describing the Internet as a “network of networks that today reaches more than 1.6 billion people worldwide”); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 ¶ 8 n.23 (2004) (“In essence, the Internet is a global, packet-switched network of networks that are interconnected through the use of the common network protocol—IP.”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 13 n.55 (2002) (“*Cable Modem Declaratory Ruling*”) (stating that “when a cable modem service subscriber initiates his cable modem service, the cable modem service subscriber’s computer becomes a part of the Internet, i.e., the network of networks and computers”); Google Comments at 13 n.36 (“The Internet has been described as a ‘network of networks,’ modular in nature, with end-to-end design (supporting edge innovation), interconnected, and using the agnostic Internet Protocol

the Internet consists only of “content and applications,” the Internet plainly includes *networks* such as those operated by broadband Internet access service providers. Moreover, the broad policy statements in the statute are as applicable to broadband Internet access service providers as they would be to Google and other participants in the Internet ecosystem. Indeed, the Commission has consistently applied those very statutory provisions to remove regulation for broadband Internet access service providers.<sup>114</sup>

The PIC parties claim that without regulation, innovators on the Internet will be forced to shape their development of new technologies and services to fit within the contours predetermined by network operators.<sup>115</sup> While this concern is theoretical with respect to broadband Internet access service providers, it in fact exists as a result of Google’s bottlenecks; for example, advertisers are forced to accommodate Google’s requirements and subjective preferences in order to receive desirable rankings and search results.<sup>116</sup> A recent example is the *New York Times*, which announced its intent to introduce a partial-subscription model (by which users will be charged after viewing a set number of articles each month) that is specifically intended to allow its website to remain included in Google’s search results.<sup>117</sup>

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(IP), all of which have contributed to its success as a ‘virtuous feedback network.’”) (citation omitted).

<sup>114</sup> See, e.g., *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 27 (2007) (“*Wireless Broadband Order*”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 19 (2005); *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, Report and Order, 19 FCC Rcd 21265 ¶ 10 (2004); *Cable Modem Declaratory Ruling* ¶ 73.

<sup>115</sup> PIC Comments at 28.

<sup>116</sup> TWC Comments at 77-78.

<sup>117</sup> See Richard Perez-Pena, *The Times to Charge for Frequent Access to Its Web Site*, N.Y. TIMES, Jan. 20, 2010.

Finally, some parties claim that net neutrality regulation should not apply to these other participants in the Internet ecosystem because it would impede innovation and investment.<sup>118</sup> Google, for example, has argued passionately against the prospect of its being subject to such rules, arguing that imposing net neutrality regulation on Google would constitute “us[ing] the regulatory process to undermine Web-based competition and innovation.”<sup>119</sup> Ironically, the same parties that invoke this rationale to avoid regulation of application, content, and service providers then proceed to claim that the proposed rules would have no adverse impact on investment and innovation undertaken by broadband Internet access service providers.<sup>120</sup> As explained at length below, net neutrality rules would severely impair broadband investment and innovation by network owners.<sup>121</sup> Free Press, Google, and like-minded commenters try vainly to show otherwise, but there is no reasonable basis for concluding that the proposed rules would be irrelevant to the decisionmaking of broadband Internet access service providers and catastrophic for everyone else.

TWC and others have pointed out that exempting Google and similarly situated entities from the proposed rules would not be merely bad policy—it would be arbitrary and capricious, and thus unlawful.<sup>122</sup> An agency acts arbitrarily and capriciously when it “applies different standards to similarly situated entities and fails to support this disparate treatment with a

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<sup>118</sup> Google Comments at 83; *id.* at 86 (“A commercial marketplace free from regulation allows entrepreneurs and innovators to focus on developing new online service, content, and applications.”).

<sup>119</sup> Richard Whitt, *Response to AT&T’s Letter to FCC on Google Voice*, Sept. 25, 2009, <http://googlepublicpolicy.blogspot.com/2009/09/response-to-at-letter-to-fcc-on-google.html>.

<sup>120</sup> *See infra* at 58-59.

<sup>121</sup> *See infra* Sections III.A.1, III.A.2.

<sup>122</sup> TWC Comments at 40.

reasoned explanation and substantial evidence in the record.”<sup>123</sup> No party supporting the NPRM’s myopic focus provides either a reasoned explanation or substantial record evidence to support applying the proposed rules to broadband Internet access service providers but not other entities that pose comparable or greater threats to “openness.”

When Google suggests that any calls to regulate it and application and service providers more broadly are motivated by spite or a desire to “dampen” the proposed rules’ prospects, rather than by “any principled legal position or demonstrated need,” it has things precisely backwards.<sup>124</sup> Indeed, Google’s advocacy for selective regulation appears motivated by a desire to entrench its substantial business advantages while preventing entrepreneurs from posing a competitive threat. The *only* principled position is one that would apply Internet openness principles equally to all participants in the Internet ecosystem—especially those that have actually been shown to act inconsistently with them—or to none at all.

## **II. PROPONENTS OF REGULATION FAIL TO REMEDY THE NPRM’S SERIOUS LEGAL DEFECTS.**

The lack of any demonstrated reason to proceed in the manner contemplated by the NPRM is particularly problematic given the complete absence of congressional direction and the constitutional implications of the rules as proposed. A number of parties have explained that the proposed regulations are not merely unnecessary but in fact unlawful. Those parties that defend the NPRM’s cause fail to overcome these legal infirmities, leaving any Commission action highly vulnerable and underscoring the case for restraint.

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<sup>123</sup> *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

<sup>124</sup> Google Comments at 83.

**A. The Commission Lacks Authority to Adopt the Proposed Rules.**

The D.C. Circuit recently invalidated the NPRM's sole jurisdictional theory, confirming that the Commission does not have unbounded ancillary authority to adopt rules of the sort proposed here.<sup>125</sup> This development should come as no surprise, as TWC and other parties—later joined by some of the NPRM's leading supporters—explained from the outset that the NPRM rested on highly questionable jurisdictional footing.<sup>126</sup> In fact, the NPRM's superficial assessment of its authority in this context prompted some proponents of regulation to begin searching for alternative jurisdictional theories well before the D.C. Circuit rejected the one offered by the NPRM. But those parties that have tried to shore up the NPRM's legal foundation fail to articulate any sustainable theory on which the Commission could assert jurisdiction here, and in any event, the Commission has not provided proper notice of any alternative theory as required by the APA.

**1. The Commission Has Not Identified Any Statutory Provisions That Support Its Ancillary Authority In This Context.**

Since the NPRM does not even suggest that the Commission has direct authority to promulgate the proposed rules, the debate necessarily centers on whether the Commission has ancillary authority to do so. Focusing on the requirement that the proposed regulations must be “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities,”<sup>127</sup> the D.C. Circuit has made clear that the Commission must identify a concrete

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<sup>125</sup> *Comcast Corp. v. FCC*, \_\_ F.3d \_\_, No. 08-1291 (D.C. Cir. Apr. 6, 2010).

<sup>126</sup> *See, e.g.*, TWC Comments at 41-44; AT&T Comments at 207-20; Verizon Comments at 86-109; *infra* at 44.

<sup>127</sup> *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citation omitted); *United States v. Sw. Cable Co.*, 392 U.S. 157, 177-78 (1968).

predicate in Title II, III, or VI to ensure that the rules are not “ancillary to nothing.”<sup>128</sup> Merely identifying some statutory provision is not enough, however; many parties note that the Commission’s ancillary authority is limited to actions that are in fact *necessary* for the “effective performance” of those substantive statutory responsibilities.<sup>129</sup> In other words, the Commission must show that the provision in question will not be achieved through other means, whether regulatory in nature or not.<sup>130</sup> And even such a necessary rule cannot be sustained if it is “inconsistent with [the] law.”<sup>131</sup> Critically, it is not enough to make these showings holistically with respect to an entire set of proposed regulations; rather, they must be made with respect to each individual requirement.<sup>132</sup>

The NPRM does not satisfy this heavy burden—in fact, it offers only a broad outline of the jurisdictional argument that the D.C. Circuit has now overturned. There may well be other provisions that would enable the Commission to adopt limited regulatory requirements in this context,<sup>133</sup> but the Commission and proponents of regulation have yet to undertake the task of identifying such provisions and supplying substantial record evidence showing how the Commission’s effective performance of the relevant duties would be thwarted in the absence of proposed rules. For instance, the PIC parties appear to believe that their passion for regulation

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<sup>128</sup> *Comcast*, slip op. at 3; *Am. Library Ass’n*, 406 F.3d at 702.

<sup>129</sup> *Sw. Cable Co.*, 392 U.S. at 178; *see also Motion Picture Ass’n of Am. Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (holding that exercises of ancillary authority cannot merely advance a “valid communications policy goal and [be] in the public interest”—they must ensure the performance of a statutorily delegated function).

<sup>130</sup> *See Verizon Comments* at 91.

<sup>131</sup> *Sw. Cable Co.*, 392 U.S. at 157, 178 (internal quotation marks omitted).

<sup>132</sup> *NARUC v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (holding that “each and every assertion of jurisdiction . . . must be independently justified as reasonably ancillary to” a specific statutorily mandated responsibility).

<sup>133</sup> *See, e.g.*, Letter from Jonathan E. Nuechterlein, Counsel for AT&T Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191 *et al.*, at 1 (filed Apr. 14, 2010).

can substitute for law: They proclaim that “[i]f the Commission becomes dissatisfied with the assertion of ancillary authority it proposes in the NPRM,” that determination “would have dire consequences to the future of America’s communications infrastructure.”<sup>134</sup> These commenters thus declare that the “prospect that the Commission has no authority” to adopt the proposed rules is “not an acceptable result,” and they accordingly urge the Commission to “pursue all available options to avoid this unpalatable result.”<sup>135</sup> In response to the D.C. Circuit’s decision, Free Press similarly insisted that the Commission “must have authority” to adopt rules and that any conclusion to the contrary “cannot be an acceptable outcome.”<sup>136</sup>

While these predictions of doom are unsupported (and unsupportable) as discussed above, the more alarming point is the suggestion that the Commission should ignore any applicable jurisdictional limitations in pursuit of a single-minded quest to take action that, as explained herein, is unnecessary, harmful, and probably unconstitutional. If the Commission seeks to impose rules in service of “openness,” the D.C. Circuit’s decision leaves no doubt that it must avoid superficial claims of authority and instead do the hard work of demonstrating a nexus between each proposed requirement and a concrete grant of statutory responsibility.

In an effort to supplement the NPRM’s sparse analysis, Google and Vonage point to Titles II, III, and VI of the Communications Act, borrowing arguments from the Commission’s appellate brief in the *Comcast* case.<sup>137</sup> Under this theory, the Commission should be allowed to regulate the Internet when some service provided over it “affects” other communications services

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<sup>134</sup> PIC Comments at 20.

<sup>135</sup> *Id.* at 21.

<sup>136</sup> Free Press, *Court Decision Endangers FCC’s Ability to Protect Net Neutrality and Implement National Broadband Plan; FCC Can and Must Act Quickly to Close the Bush Era Loophole*, Apr. 6, 2010, <http://www.freepress.net/node/78462>.

<sup>137</sup> Google Comments at 45; Vonage Comments at 11-14; *see also* Br. for Respondents, *Comcast Corp. v. FCC*, No. 08-1291, at 43-45 (D.C. Cir. filed Sept. 21, 2009).

currently regulated under these Titles—telephony, broadcast, and cable, respectively. But that asserted hook is far too tenuous to bestow authority upon the Commission here, even apart from the Commission’s failure to advance such a theory in the NPRM. As an initial matter, neither Google nor Vonage isolates a *specific* statutory mandate in these Titles warranting the imposition of the proposed rules; instead, they claim that Titles II, III, and VI provide a *general* basis for asserting ancillary authority.<sup>138</sup> But that is akin to stating that the proposed rules fall within the subject matter jurisdiction of the Act, which is not the prong of the ancillary jurisdiction test in dispute. Moreover, this conception of the Commission’s ancillary authority would have no discernible limitations, giving the agency sweeping powers to extend regulation every time a new application of service poses an alternative to regulated service offerings. While the D.C. Circuit certainly left open the possibility that the Commission can exercise its ancillary authority in this context, it confirmed that such authority is not unbounded.<sup>139</sup>

Critically, even apart from these problems, Google and Vonage fail to show that the proposed rules are in fact necessary to the Commission’s effective regulation of telephony, broadcast, or cable as a whole under these Titles. They claim that the Commission’s assertion of jurisdiction here is analogous to its actions in *Southwestern Cable*, where it sought to regulate cable television in order to give effect to specific statutory provisions relating to the orderly

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<sup>138</sup> Google Comments at 45-47; Vonage Comments at 14-15.

<sup>139</sup> *Comcast*, slip op. at 24 (describing prior cases in which the Commission “strain[ed]” and later “exceeded” the “outer limits” of its ancillary authority, and then concluding that “here it seeks to shatter them entirely”); *see also Midwest Video II*, 440 U.S. at 706; Electronic Frontier Foundation Comments at 7-8 (stating that Congress “has not deputized” the Commission “to be a free roving regulator of the Internet”—and for good reason, as “the prospect of unelected Commissioners regulating the Internet without statutory constraint poses an intolerable risk to free speech, innovation, and competition”).

development of local television broadcasting.<sup>140</sup> Unlike the market conditions faced by the Commission in that case, however, new Internet-based services do not threaten to undermine an entire regulatory scheme—rather, they complement, and at most “compete” with, regulated services. In this regard, the proposed rules are more analogous to those the Supreme Court struck down in *Midwest Video II*, which it found were not *necessary* to carry out expressly assigned obligations.<sup>141</sup> In any event, Google and Vonage do not explain how subjecting broadband Internet access service providers to nondiscrimination and other requirements would achieve the goal of ensuring competitive parity between Internet-based services and more traditional regulated services.

Finally, any proposed net neutrality rules must not conflict with text or structure of the Telecommunications Act of 1996. As noted, the Commission may only invoke its Title I ancillary authority if its action is “not inconsistent with th[e] [Act].”<sup>142</sup> But as TWC has explained, the proposed rules would turn the statutory framework on its head by imposing more onerous obligations on information services, which are exempt from common carrier regulation, than on telecommunication services, which are subject to such requirements.<sup>143</sup> The NPRM concedes as much, and its supporters even try to justify that result.<sup>144</sup> In short, the proposed action would undo the Commission’s longstanding regulatory distinction between “basic” and

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<sup>140</sup> *Sw. Cable Co.*, 392 U.S. at 174-75 (citing 47 U.S.C. §§ 307(b), 303(f), (h)).

<sup>141</sup> *Midwest Video II*, 440 U.S. at 709; *see also Comcast*, slip op. at 21-22.

<sup>142</sup> 47 U.S.C. § 154(i).

<sup>143</sup> TWC Comments at 63.

<sup>144</sup> *See* NPRM ¶¶ 103-04, 109 (admitting that its proposed nondiscrimination rule “bears more resemblance to *unqualified* prohibitions on discrimination added to Title II in the 1996 Telecommunications Act than it does to the general prohibition on ‘*unjust or unreasonable*’ discrimination by common carriers in section 202(a) of the Act”) (quoting 47 U.S.C. § 202(a) (first emphasis added)); *see also, e.g.*, Google Comments at 61-62.

“enhanced” services,<sup>145</sup> codified by Congress in the 1996 Act’s definitions of “telecommunications service” and “information service.”<sup>146</sup> Moreover, it would do so despite the 1996 Act’s clear statements favoring minimal regulation of the latter.<sup>147</sup> The Commission cannot use its ancillary authority to achieve that unlawful result.

## **2. The Commission Cannot Use This Proceeding To Regulate the Transmission Component of Broadband Internet Access Services.**

Some parties have argued that the Commission can promulgate the proposed rules without invoking its ancillary authority, by relying on some other asserted source of authority not mentioned in the NPRM.<sup>148</sup> These jurisdictional Hail Mary’s preceded (and foreshadowed) the D.C. Circuit’s decision invalidating the single Title I theory on which the NPRM relies and seeks comment. In fact, some of the proposed rules’ defenders have been steadily backtracking in their support of the Commission’s ancillary authority and appeared to have given up the ghost entirely even before the *Comcast* case was even decided.<sup>149</sup> In the wake of that decision, these parties have asserted that the Commission’s *only* option is to reverse years’ worth of precedent and impose common carrier regulation on broadband Internet access service providers—which appears to be the outcome that they have desired all along.<sup>150</sup>

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<sup>145</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 ¶¶ 282-85 (1980).

<sup>146</sup> 47 U.S.C. §§ 153(43), (46).

<sup>147</sup> *Id.* § 230(b).

<sup>148</sup> See PIC Comments at 6; Google Comments at 42; Free Press Comments at 31-32.

<sup>149</sup> Compare Free Press Comments at 31 (referring to the Commission’s “very clear[]” ancillary authority), with Letter from Ben Scott, Policy Director, Free Press, to Julius Genachowski, Chairman, FCC, GN Docket No. 09-191 *et al.*, at 3 (filed Feb. 24, 2010) (asserting that any reliance on Title I ancillary authority would put the Commission on “fragile jurisdictional footing”).

<sup>150</sup> See, e.g., Letter from Aparna Sridhar, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191 *et al.*, at 1 (filed Apr. 9, 2010).

As an initial matter, the D.C. Circuit’s decision does not flatly preclude alternative ways for the Commission to invoke its ancillary authority. The court concluded that the Commission, in the order under review, had “failed to tie” its assertion of ancillary authority in that case to any statutorily mandated responsibility (relying instead solely on statements of general policy), but it did not find that the Commission could *never* establish such a nexus as to any and all regulations applicable to the Internet. In fact, the court discussed several possible alternative arguments as to the matters at issue here but declined to rule on them because they had been raised in the Commission’s appellate brief rather than in the order on review.<sup>151</sup> In other words, the *Comcast* decision notwithstanding, the Commission could still proceed on the basis of its ancillary authority—if it can make the necessary showing as to the rules it adopts and otherwise complies with applicable legal limitations.

Regardless of what jurisdictional paths the Commission now may consider, it cannot simply abandon the stated legal foundation of the proposed rules midstream in favor of other possibilities that came along well after the NPRM was released. Indeed, the record in this proceeding—which has focused on whether the Commission has ancillary jurisdiction to adopt the proposed rules—does not remotely support any of the potential alternate legal theories that would permit the Commission to take the same action. Rather, the Commission would have to provide proper notice of and seek comment on the relevant factual, legal, policy, and economic issues attendant to a new jurisdictional theory—which it has not yet done.<sup>152</sup>

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<sup>151</sup> *Comcast*, slip op. at 34 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)); see also *id.* at 30 (stating that the other statutory provisions cited in the Commission’s brief “could at least arguably be read to delegate regulatory authority to the Commission”).

<sup>152</sup> See *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) (issuance of a public notice not sufficient notice for APA purposes).

It bears emphasizing that even if the Commission properly addresses the procedural obstacles, significant substantive challenges remain. A few parties ask the Commission to start over by reclassifying broadband Internet access service (or a component thereof) under Title II, based on a reinterpretation of what these providers “offer” to end users.<sup>153</sup> The NPRM does not mention this approach at all—which is not surprising, as the Commission already rejected it and the Supreme Court upheld that determination.<sup>154</sup> Consistent with that precedent, two commissioners have already expressed their opposition to such a course of action.<sup>155</sup> In any event, there is no basis for such a radical change of course. As explained at length in a joint filing by TWC and other broadband Internet access service providers,<sup>156</sup> the Commission previously issued detailed factual findings that various broadband Internet access service platforms “inextricably combine[] the transmission of data . . . with computer processing, information provision, and computer interactivity,”<sup>157</sup> and thus constitute information services that *make use of* a “telecommunications” component rather than *offering* a separate

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<sup>153</sup> Free Press Comments at 31-32; PIC Comments at 21. The same basic argument was raised late in the Commission’s National Broadband Plan proceeding as a misguided proposal for promoting broadband adoption and deployment. *See, e.g.*, Reply Comments of Public Knowledge, NBP Public Notice #30, GN Docket Nos. 09-47 *et al.*, at 1 (filed Jan. 26, 2010). TWC has already explained in that proceeding how this approach would undermine both of these goals. *See* Reply Comments of Time Warner Cable Inc., GN Docket No. 09-51, at 19-23 (filed July 21, 2009) (“TWC Broadband Plan Reply Comments”).

<sup>154</sup> *See Brand X*, 545 U.S. at 989; *Cable Modem Declaratory Ruling* ¶¶ 36-37.

<sup>155</sup> News Release, *Statement of Commissioner Robert M. McDowell on the Recent D.C. Circuit Court of Appeals Decision in the Comcast/BitTorrent Case*, at 1 (rel. Apr. 6, 2010); News Release, *Statement of Commissioner Meredith A. Baker on D.C. Circuit Decision Vacating the Commission’s Order on Comcast’s Network Management Practices*, at 1 (rel. Apr. 6, 2010).

<sup>156</sup> *See generally* Letter to Julius Genachowski, Chairman, FCC, from Kyle E. McSillarow, National Cable & Telecommunications Association (“NCTA”) *et al.*, GN Docket Nos. 09-51, 09-191, WC Docket No. 07-52 (filed Feb. 22, 2010) (“Industry Title II Letter”).

<sup>157</sup> *Wireless Broadband Order* ¶ 25.

“telecommunications service.”<sup>158</sup> The Supreme Court affirmed that determination in *Brand X*, and there is no reason to believe that the Commission is free to overturn that interpretation at will.<sup>159</sup>

Even if the Commission were not constrained by that precedent as a legal matter, there is no principled basis in the record for concluding, as a factual matter, that broadband Internet access service providers now “offer” telecommunications directly to end users, separate and apart from the information-processing elements that make use of that telecommunications functionality.<sup>160</sup> After years of factual findings justifying a *contrary* position on the nature of broadband Internet access services, the Commission would be hard pressed to “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>161</sup> Nor is there any clear way the Commission could suddenly disavow the strong policy interest—which guided its prior decisions—in *avoiding* the investment-inhibiting and innovation-curtailling effects of Title II requirements in the broadband arena.<sup>162</sup> For years, the industry has

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<sup>158</sup> Industry Title II Letter at 6-10.

<sup>159</sup> *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) (stating that a scenario in which an agency “reversed or ignored” a decision of an Article III court would be “not only bizarre” but “probably unconstitutional”).

<sup>160</sup> Industry Title II Letter at 8-9 (explaining that nothing has changed with respect to broadband Internet access service to warrant a change of the Commission’s past factual findings).

<sup>161</sup> *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1811 (2009) (stating that a more detailed justification is required when an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy” or “when its prior policy has engendered serious reliance interests that must be taken into account”) (citation omitted).

<sup>162</sup> See, e.g., *Cable Modem Declaratory Ruling* ¶ 47; *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 46 (1998) (“*Report to Congress*”) (finding that regulating broadband Internet access providers as common carriers could “seriously curtail the regulatory freedom that . . . was important to the healthy and competitive development of the enhanced-services industry”).

relied on that established policy to take investment and innovation to new levels, facilitating substantial expansion and improvements in broadband in recent years. These “serious reliance interests” similarly would require a detailed factual finding to justify a 180-degree policy change.<sup>163</sup> And all of these burdens would be even higher with respect to cable modem services, which have *never* been subject to Title II regulations.

In addition to navigating these significant obstacles, the Commission would have to assess and justify the destructive consequences (intended and unintended) of an approach premised on Title II. This would require, first and foremost, that the Commission specifically seek comment on those consequences and compile the requisite record. After doing so, it would no doubt find that Title II reclassification could be even more harmful to investment and innovation than its currently proposed approach to net neutrality regulation—which is saying something, given the myriad ways that the proposed rules would limit broadband Internet access service providers as described below and in TWC’s previous comments.<sup>164</sup> Further, such a reinterpretation could extend full-fledged common carrier regulation to many corners of the Internet ecosystem, reversing decades of pro-innovation precedent at a time when those policies are most needed.<sup>165</sup> These results cannot be casually discounted,<sup>166</sup> nor can they be easily

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<sup>163</sup> *Fox*, 129 S. Ct. at 1811; *see also* Industry Title II Letter at 3-5.

<sup>164</sup> *See infra* Section III.A.

<sup>165</sup> Industry Title II Letter at 11-12.

<sup>166</sup> *Id.* at 10 (citing the Supreme Court’s description of regulations that would follow from classifying broadband Internet access under Title II). In addition, such an outcome would be even less narrowly tailored than the proposed rules currently are, compounding their constitutional flaws. *See infra* Section II.B.

remedied given the limitations that the Commission has acknowledged concerning its forbearance authority.<sup>167</sup>

The emerging enthusiasm for a Title II approach among proponents of regulation in this area is somewhat perplexing, because this theory—despite its potentially broad and destructive impact—still would not accomplish what the Commission originally set out to do in the NPRM and what the NPRM’s chief defenders misguidedly believe needs to be done. While Title II does not come with its own preset “openness” rules *per se*, some would point to its prohibition on unreasonable discrimination as the next best thing. But the Commission and its supporters are already on record as saying that this standard is not sufficient to address Internet openness, which is why the NPRM proposed the nondiscrimination requirement that is the centerpiece of the proposed rules. To be sure, TWC and others have explained that a prohibition on unreasonable discrimination, while still imperfect, is at least preferable to a strict nondiscrimination standard.<sup>168</sup> But there should be no doubt that reliance on Title II would preclude a flat ban on business arrangements that entail any kind of payment for service enhancements.

Finally, even in the unlikely event that the Commission could justify a shift to Title II regulation in the Internet arena as a *jurisdictional* matter, that would not remedy the other legal defects in the proposed rules. As discussed below and in TWC’s opening comments, any regulation in this area would threaten important First Amendment rights no matter what its jurisdictional basis. Converting broadband Internet access service providers and others in the Internet ecosystem into common carriers would not deprive them of that constitutional protection. Further, while Title II could sweep far and wide as noted above, it is not assured of reaching every entity shown to impact Internet openness. In this respect, Title II lacks some of

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<sup>167</sup> Industry Title II Letter at 12-13 (quoting *Report to Congress* ¶¶ 46-47).

<sup>168</sup> See *infra* at 63.

the flexibility of Title I to address all instances in which Internet openness as discussed in the NPRM has actually been compromised. And as discussed above, any approach that leaves such entities out would be arbitrary and capricious.

In what appears to be an alternate version of the Title II “reclassification” argument (also absent from the NPRM), a few parties suggest that the Commission could force broadband Internet access service providers to “unbundle” the transmission piece of their services and offer it on a common carrier basis, separate from the service provided to end users.<sup>169</sup> They say that the Commission “traditionally” regulated Internet access transmission in the *Computer Inquiry* decisions and can simply resume that tradition here.<sup>170</sup> But the Commission (upheld by the Supreme Court) has properly rejected the notion of forcibly separating out a stand-alone “telecommunications” component as “radical surgery.”<sup>171</sup> Further, the decisions cited are inapposite because they imposed obligations on entities that were *voluntarily* providing “telecommunications” on a stand-alone basis. Moreover, those decisions were expressly based on a “careful analysis” of the intended regulatees’ market power and control over bottleneck facilities.<sup>172</sup> Again, the NPRM does not call for or even contemplate that type of analysis, and in any event, the broadband arena remains vibrant with competition.<sup>173</sup> In short, the *Computer Inquiry* decisions provide no support for imposing a mandate that would require cable operators,

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<sup>169</sup> PIC Comments at 6; Free Press Comments at 2; Google Comments at 42. The PIC parties suggest that the Commission may exercise its Title I ancillary authority to achieve this result, although they do not even purport to apply the applicable standard for assessing that authority as described above. PIC Comments at 6.

<sup>170</sup> PIC Comments at 7.

<sup>171</sup> *Cable Modem Declaratory Ruling* ¶ 43.

<sup>172</sup> *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order, 84 F.C.C.2d 50 ¶ 71 (1980).

<sup>173</sup> *See supra* Section I.A.

satellite providers, wireless carriers, and others offering broadband Internet access services to operate on a common carrier basis, for the first time and against their will.

In the end, the proponents of regulation fail to show how the Commission could lawfully take the actions proposed in the NPRM. Given their simultaneous inability to explain why those actions are even necessary, the Commission could only proceed at its own significant risk.

**B. The Proposed Rules Would Violate the First Amendment.**

The legal impediments presented by the Commission’s jurisdictional limitations are compounded by the fact that the Commission seeks to impose rules that pose serious constitutional problems.<sup>174</sup> As explained in TWC’s opening comments and in the analysis by Professor Laurence Tribe and Thomas Goldstein attached thereto, the proposed rules—not to mention net neutrality regulation in general—would jeopardize important First Amendment rights by thrusting the government into broadband Internet access service providers’ choices concerning their private speech without any plausible justification or any effort to tailor the rules narrowly.<sup>175</sup> Other parties agree.<sup>176</sup>

Free Press tries to brush off this constitutional concern with a narrow view of the First Amendment that betrays the message its own name is intended to convey. Its primary claim is that broadband Internet access service providers do not engage in protected speech because they do not engage in any editorial discretion, instead limiting their activities to “non-expressive

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<sup>174</sup> See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988) (holding that National Labor Relations Board lacked authority to construe ambiguous statute in a manner that posed “a substantial issue of validity under the First Amendment”).

<sup>175</sup> TWC Comments at 45; *id.*, Exhibit A, Laurence H. Tribe & Thomas C. Goldstein, *Proposed “Net Neutrality” Mandates Could be Counterproductive and Violate the First Amendment* (Oct. 19, 2009) (“Tribe & Goldstein”).

<sup>176</sup> See, e.g., AT&T Comments at 235-55; Free State Foundation Comments at 16-21; NCTA Comments at 49-64; Verizon Comments at 111-19.

conduct”—specifically, “the routing of data over networks.”<sup>177</sup> According to Free Press, protected editorial discretion is limited to content-based decisionmaking, which it asserts network operators have disavowed (for example, to avoid tort liability).<sup>178</sup> Of course, Free Press’s position that broadband Internet access service providers disclaim responsibility over “which” data packets they route underscores the central point discussed above—that such providers do not interfere with Internet openness.

In any event, Free Press’s defense of those proposed rules is wrong on several levels. First, the proposed rules directly impact First Amendment rights by banning *any* editorial discretion by broadband Internet access service providers. The exercise of that discretion can take several forms. Fundamentally, even the decision to make *all* content available constitutes an exercise of editorial discretion entitled to constitutional protection.<sup>179</sup> Although Free Press appears to believe that such communications are protected only if they convey the provider’s own viewpoint,<sup>180</sup> the courts long ago foreclosed the notion that the broadband Internet access service provider must be the one generating the content in order to become eligible for protection.<sup>181</sup> Likewise, a decision to provide access only to targeted content would constitute a

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<sup>177</sup> Free Press Comments at 139.

<sup>178</sup> *Id.* at 139.

<sup>179</sup> TWC Comments at 47.

<sup>180</sup> *See, e.g.*, Free Press Comments at 137-38 (stating that the “act of routing data packets is not itself inherently expressive”); *id.* at 138 (stating that the proposed rules would not “affect[] the messages of phone and cable companies”).

<sup>181</sup> *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.”); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (holding that when Internet service providers “contract[] with [others] to transmit [others’] speech,” they act as members of the media protected by the First Amendment

protected exercise of editorial discretion—regardless of who generated the content.<sup>182</sup> This is no less true of a broadband Internet access service provider than it is of a newspaper. Like a newspaper, a broadband Internet access service provider has limited capacity.<sup>183</sup> Just as the government may not instruct a newspaper as to how to use its space or what content it must carry, it may not without sufficient justification direct broadband Internet access service providers on how to allocate their bandwidth or what content they must carry.<sup>184</sup> Free Press attacks this analogy on the theory that the latter group neither selects nor influences the content it carries.<sup>185</sup> Again, that broadband Internet access service providers today generally choose to make all content available in response to consumers’ demands is an election that itself is entitled to constitutional protection, and TWC and others have explained that they may offer more tailored services as well.<sup>186</sup>

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and “[a]ny ‘entity’ that enters into such a contract becomes by definition a medium of communication, if it was not one already”); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) (holding that First Amendment precedent does not “require a speaker to generate, as an original matter, each item featured in the communication”); *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986) (finding that the First Amendment protects a speaker’s right to exercise editorial discretion and choose what content to carry, even when the speaker is not the individual “author” of any particular piece).

<sup>182</sup> See, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment.”).

<sup>183</sup> TWC Comments at 66-67.

<sup>184</sup> *Tornillo*, 418 U.S. at 258 (unanimously striking down a law requiring a newspaper to offer space for a rebuttal by an election candidate who had been “assailed regarding his personal character or official record” in that newspaper because the newspaper had the right to make its own decision about what to publish); Tribe & Goldstein at 3; TWC Comments at 45; Verizon Comments at 111.

<sup>185</sup> Free Press Comments at 139-40.

<sup>186</sup> See *infra* at 69.

In proceeding to argue that the proposed rules do not interfere with any editorial choices even if they are covered by the First Amendment, Free Press demonstrates a fundamental misunderstanding about what the rules it endorses actually would do.<sup>187</sup> TWC and others have explained that a strict nondiscrimination requirement could make it *per se* unlawful for broadband Internet access service providers to offer any customized, content-differentiated service, even though other providers (such as Amazon) already do this—with Free Press’s tacit endorsement.<sup>188</sup> Free Press suggests that such plans raise the specter of “censorship” by broadband Internet access service providers.<sup>189</sup> But the notion that broadband Internet access service providers alone should not be allowed to provide access to targeted content in response to consumer demand is nonsensical.<sup>190</sup> Apart from such tailored offerings, TWC has also explained that the proposed rules would interfere with the ability of broadband Internet access service providers to provide access to all content by restricting their flexibility to employ reasonable means of managing traffic on their networks—whether through direct restrictions or overly vague rules that would chill protected speech for fear of violation.<sup>191</sup> In addition, apart from such express restrictions, the vagueness of the proposed rules would chill protected speech for fear of violation. As TWC has explained, the failure of the rules to provide clear standards for

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<sup>187</sup> Free Press Comments at 138.

<sup>188</sup> TWC Comments at 45, 87; *see also infra* Sections III.A.1, III.A.2 (describing the broad prohibitions contemplated by the proposed rules).

<sup>189</sup> Free Press Comments at 140.

<sup>190</sup> However, Free Press appears to believe such practices would be acceptable when provided as “managed services” that do not touch the public Internet. *Id.* at 104.

<sup>191</sup> TWC Comments at 47.

permissible and unlawful conduct results in substantial uncertainty that would impede innovation in the same way that express restrictions would.<sup>192</sup>

The end result, as TWC and others have explained, is government encroachment on protected speech that is presumptively unconstitutional.<sup>193</sup> That conclusion is firmly established by existing precedent, and it was reinforced by the Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*.<sup>194</sup> There, the Court emphasized that the First Amendment stands as a limit on attempts by the government to select disfavored and favored speakers—translated here as broadband Internet access service providers and everyone else, respectively.<sup>195</sup> The Court further criticized making distinctions regarding First Amendment rights based on the particular technologies employed, stating that “[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in *certain media* or by certain speakers.”<sup>196</sup> The proposed rules run afoul of both key principles.

Neither the Commission nor any party has advanced a sufficient justification for these restrictions. Free Press—joined by Google and others—argues that the proposed rules would actually promote the First Amendment by helping the public gain access to speech and ideas.<sup>197</sup> But as TWC has explained and as the Supreme Court recently reconfirmed, the First Amendment

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<sup>192</sup> *Id.* at 46-47; *see also* Net Neutrality Regulation: The Economic Evidence at 24 (stating that the “proposed regulations are ambiguous and poorly drafted,” and referring to the “many uncertainties companies would face if the rules were adopted”).

<sup>193</sup> TWC Comments at 47; Tribe & Goldstein at 3-4.

<sup>194</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

<sup>195</sup> *Id.* at 899 (“[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”).

<sup>196</sup> *Id.* at 912-13 (emphasis added).

<sup>197</sup> Google Comments at 49; Open Internet Coalition Comments at 10; PIC Comments at 17.

does not countenance denying one party’s speech rights in order to promote opportunities for speech by others (or any other amorphous First Amendment “value”).<sup>198</sup> Moreover, as discussed herein and in TWC’s opening comments, there is no evidence that the proposed rules would lead to greater access to speech.<sup>199</sup> Finally, neither the NPRM nor any of its supporters has shown that the proposed rules would address a significant and real—as opposed to conjectural—harm, or that the proposed rules are narrowly tailored to achieve the Commission’s objectives.<sup>200</sup> As a result, no party is able to cure the severe constitutional vulnerabilities of the proposed rules.

### **III. ANY REGULATION MUST PRESERVE FLEXIBILITY TO INNOVATE AND EXPERIMENT WITH DIFFERENTIATED PRICING MODELS AND SERVICE OFFERINGS.**

Net neutrality proponents and opponents alike agree that the Internet has become an essential source of information and a platform for free speech, democratic participation, commerce, and social engagement.<sup>201</sup> Several prominent supporters of the NPRM speak reverently about the environment of “innovation without permission” that produced these benefits.<sup>202</sup> But these same parties then advocate rules that would expressly require broadband Internet access service providers to seek and obtain the permission of the Commission before they can introduce *any* new innovations (including critically important innovation at the network

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<sup>198</sup> TWC Comments at 45; *Citizens United*, 130 S. Ct. at 898-99; *see also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (“the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).

<sup>199</sup> TWC Comments at 47.

<sup>200</sup> *Id.*; Tribe & Goldstein at 4.

<sup>201</sup> *See, e.g.*, PIC Comments at 24-28 (discussing the many new and evolving ways the Internet is used and the growing number of people using it, and celebrating the innovation and economic growth that have occurred in recent years because of the Internet); Google Comments at 4-10; Free Press Comments at 9.

<sup>202</sup> *See, e.g.*, Google Comments at 25, 86; Free Press Comments at 44.

“layer” that fuels innovation overall), to the extent they are allowed to pursue them at all.

Through such proposals, the pro-regulatory faction appears willing to put all of the progress achieved thus far at risk. Some of these commenters may have something to gain from rules that severely limit the flexibility of broadband Internet access service providers (as such limits would restrict competition), but the Commission and consumers clearly would not. Rather, the Commission should pay heed to the NPRM’s recognition of the importance of promoting investment and innovation and allow that core principle to guide its consideration of regulation here.

**A. The NPRM’s Supporters Fail To Rebut the Significant Harms That Will Follow Adoption of the Proposed Rules.**

TWC and others have explained that adopting the regulations as proposed in the NPRM would come at tremendous expense. The strict nondiscrimination requirement (including but not limited to its flat ban on charges to content, application, and service providers) and the current version of the provisions governing reasonable network management (which creates substantial uncertainty regarding what practices are permissible) would stymie investment and innovation by broadband Internet access service providers and prevent them from being able to meet the differing demands and needs of all types of consumers.<sup>203</sup> The ambiguity in the proposed rules would produce the same result.<sup>204</sup> The response of the NPRM’s supporters is, in essence, “prove it.” This shifting of the burden to the intended targets of regulation is a backwards approach to policymaking. In any event, TWC and others have described at length how the rules, as they stand, would prohibit practices that benefit consumers, preserve barriers to entry for emerging edge companies in the broadband arena, and expand the digital divide. Such consequences

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<sup>203</sup> See generally TWC Comments at 30-35, 53-58.

<sup>204</sup> See, e.g., *id.* at 32.

cannot be justified, particularly in light of the pro-investment and pro-adoption recommendations set forth in the National Broadband Plan.

**1. The Sweeping Restrictions Proposed for Broadband Internet Access Service Providers Will Impede Investment and Innovation.**

The NPRM’s supporters—Free Press most aggressively among them—strive to show that the proposed regulations will have no negative impact on broadband investment or innovation, but their arguments are naïve at best and hopelessly flawed at worst. Free Press first asserts that the rules will result in “little or no near-term costs” because no prohibited practices are occurring—suggesting that nothing would change when the rules come into effect.<sup>205</sup> Aside from underscoring the absence of any problem warranting intervention, Free Press is wrong, as the inflexibility created by the rules would extend to virtually anything a broadband Internet access service provider does or may want to do.

Turning to the longer-term costs, pro-regulation commenters argue unpersuasively that the proposed rules will not impede broadband infrastructure investment. Operating and innovating on a broadband network is inherently expensive and requires years of advance effort and research before new services can be launched. Despite observing that broadband Internet access service providers participate in “one of the most capital-intensive sectors in our economy,” Free Press advances the novel theory that their investment decisions do not even take regulation into account.<sup>206</sup> The many flaws in that argument have been documented already in

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<sup>205</sup> Free Press Comments at 76.

<sup>206</sup> *Id.* at 12; *see also id.* at 13 (purporting to list “all” factors that influence investment, without including regulation); S. Derek Turner, *Finding the Bottom Line: The Truth About Network Neutrality & Investment*, at 2 (Oct. 2009) (stating that regulation plays a “minor role” in broadband investment decisions and that regulation does not deter investment in the communications sector).

this proceeding.<sup>207</sup> Certainly, the Commission has long recognized and been guided by the obvious link between regulation and investment, consistently reducing the former to promote the latter; Congress has provided similar direction. Likewise, the Department of Justice has advised the Commission against adopting regulation in order to “avoid stifling the infrastructure investments needed to expand broadband access.”<sup>208</sup> Several studies find that net neutrality regulation would reduce incentives to invest in networks by curtailing the ability of network owners to innovate with new business models and in other respects.<sup>209</sup> In fact, as discussed below, even some of Free Press’s allies note that net neutrality regulation could impede the development of managed services (although they fail to realize that the same is true of all services).<sup>210</sup> And as noted above, Google seeks to escape regulation of its own services on the basis that neutrality mandates would undermine investment and innovation.

The argument that net neutrality regulation would not impact broadband investment begins with the observation that broadband Internet access service providers have made substantial investments in recent years while the Commission’s *Internet Policy Statement* has been in place.<sup>211</sup> Of course, the fact that such investments have occurred is evidence of the

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<sup>207</sup> See generally Letter from Steven Pociask, American Consumer Institute, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed Feb. 10, 2010), attaching Larry F. Darby, *The Informed Policy Maker’s Guide to Regulatory Impacts on Broadband Network Investment*.

<sup>208</sup> U.S. Department of Justice Ex Parte, GN Docket No. 09-51, at 28 (filed Jan. 4, 2010).

<sup>209</sup> Larry F. Darby & Joseph P. Fuhr Jr., *Innovation and National Broadband Policies: Facts, Fiction and Unanswered Questions*, The American Consumer Institute, Mar. 2, 2010, at 13-15; Net Neutrality Regulation: The Economic Evidence at 21-22.

<sup>210</sup> See *infra* Section III.B.

<sup>211</sup> Google Comments at 38-39; Open Internet Coalition Comments at 32-33; Free Press Comments at 23-30. Unable to give broadband Internet access service providers credit for anything, Free Press has simultaneously claimed that they are “disinvesting” in their

extensive competition that these parties mistakenly deny. But the notion that such investment will continue on the same trajectory if the proposed rules are adopted reflects a fundamental misconception of the regime now under consideration. As an initial matter, even the current environment presents challenges to investment and innovation; while broadband Internet access service providers do have flexibility to try different business models, the *Internet Policy Statement* and the *Comcast Network Management Practices Order* (prior to its being vacated) have generated significant uncertainty about what practices are permissible, as the threat of post-hoc enforcement action has hung over the industry. In fact, Google and Free Press have cited that uncertainty as a reason why binding rules are now needed.<sup>212</sup>

The NPRM, however, would significantly ratchet up the degree of regulation, although some of its key supporters appear to be in deep denial of this fact. They characterize the proposed regime as “narrow,” “minimally intrusive,” and even “light touch,”<sup>213</sup> but it is unclear what rules they are reading. For example, it is difficult to interpret the language requiring that broadband Internet access service providers treat all content, application, and service providers “in a nondiscriminatory manner,” and the accompanying commentary in the NPRM that this

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networks. *Finding the Bottom Line*, *supra*, at 2. This theory has likewise been thoroughly discredited. *See* Darby, *supra*, at 7-9.

<sup>212</sup> Google Comments at 39-40 (stating that “it is far from clear how the FCC’s policy statements apply” and that there “is increasing uncertainty about whether particular practices . . . are permissible,” and concluding that “[r]ather than [maintaining] continued uncertainty, the Commission should establish clearly to whom the rules apply, and what conduct is proscribed or permitted”); Letter from Ben Scott & Chris Riley, Free Press, to Acting Chairman Michael Copps, FCC, WC Docket No. 07-52, at 12 (filed Apr. 3, 2009) (noting the need to resolve “lingering uncertainty” and “alleged ambiguity”).

<sup>213</sup> *See, e.g.*, Google Comments at i-ii, 51; PIC Comments at v; Free Press Comments at 68. The term “light touch” is frequently used to divert attention from the onerous nature of proposed broadband regulations. *See* Remarks of Michael K. Powell, Chairman, Federal Communications Commission, National Summit on Broadband Deployment, Oct. 25, 2001, at 18, <http://www.fcc.gov/Speeches/Powell/2001/spmcp110.pdf> (“When someone advocates regulatory regimes for broadband that look like, smell like, feel like common carriage . . . [t]hey will almost always suggest it is just a ‘light touch.’”).

requirement is intended to “prohibit[s] charges . . . for enhanced or prioritized service,” without concluding that such providers could be limited in providing even beneficial services such as family-friendly and other walled-garden offerings, CDN-type services, and others. These consequences are not just “imagined” as Free Press alleges,<sup>214</sup> they follow from the NPRM’s plain text and are consistent with the expansive interpretations advanced by the nondiscrimination rule’s supporters.<sup>215</sup> Even the Commission has recognized that a ban on “nondiscrimination” as proposed in the NPRM is stricter than that which currently applies to providers of telecommunications services under Title II, meaning that broadband Internet access service providers would be subject to *more* regulation than monopoly telephone providers.<sup>216</sup>

Those parties that mistakenly laud the NPRM as being minimally intrusive undermine that already weak claim by proposing yet more burdens. For example, as discussed further below, Free Press and Google demand that the Commission institute a formal process by which broadband Internet access service providers would bear a significant burden of proof to justify their use of network management techniques; they also insist that elaborate and ongoing disclosures be made before any new practices could be implemented.<sup>217</sup> Several parties propose a whole new enforcement process to govern asserted violations of the proposed rules, complete

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<sup>214</sup> See, e.g., Free Press Comments at 76.

<sup>215</sup> See, e.g., *id.* at 74 (“The Commission should establish a clear rule against all discriminatory behavior[.]”); *id.* at 75 (stating that “[n]o categories of discriminatory behavior should be exempted from the rules,” because “[a]ny discrimination slows or blocks some traffic”); PIC Comments at 31-32 (asking the Commission to clarify that the ban on charges is merely one example of the type of practice that would violate the rule); NASUCA Comments at 2 (“We believe there is much to recommend the common carrier system . . .”).

<sup>216</sup> TWC Comments at 62 (citing NPRM ¶ 109; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 ¶ 71 (2001) (citation omitted)).

<sup>217</sup> See *infra* Section III.C.

with its own special pleading standard and a specific timeframe for decisions, designed to make filing complaints easier than it is under the existing process<sup>218</sup>—although broadband Internet access service providers would not be entitled to utilize the same process in the event they are victims of discriminatory conduct.<sup>219</sup> Google would even have the Commission appoint “a dedicated consumer advocate” who would work the Enforcement Bureau and consult with newly formed “Technical Advisory Groups (TAGs)” to enforce the rules.<sup>220</sup> Other parties make further proposals that are even more detached from reality. For example, Dish Network insists that broadband Internet access service providers be subjected to “random audits” by “Commission field engineers” to monitor their compliance with any rules.<sup>221</sup> NASUCA argues for functional separation rules that evoke the historical regulation of the Bell Operating Companies (“BOCs”),<sup>222</sup> ignoring the fact that the Commission has sought to eliminate such requirements even for the BOCs due to the enormous costs they impose.<sup>223</sup> One way or the other, the highly regulatory vision embraced by these parties is the antithesis of the “light-touch” regime they claim to be endorsing in the NPRM.

TWC and others have proposed several modifications to the proposed rules that would address their overbroad scope and at least mitigate the resulting harms. For example, many

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<sup>218</sup> PIC Comments at 69-72; Google Comments at 87-92; Open Internet Coalition Comments at 68-69; Dish Network Comments at 9.

<sup>219</sup> Google Comments at 88-89 (excluding broadband Internet access service providers from the list of “aggrieved parties” who would be entitled to file complaints).

<sup>220</sup> *Id.* at 88, 91-92. Google’s joint filing with Verizon portrays these TAGs as a critical part of a system of industry-based “self-governance,” Verizon/Google Letter at 4-5, whereas Google’s principal filing seems to contemplate a more active and regulatory role.

<sup>221</sup> Dish Network Comments at 9.

<sup>222</sup> NASUCA Comments at 16.

<sup>223</sup> *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 ¶ 71 (2007).

parties, including TWC, have proposed that if the Commission remains committed to adopting rules, it should replace the nondiscrimination requirement with a prohibition on “unreasonable discrimination.”<sup>224</sup> Such a standard remains quite problematic, but it is at least better than the proposed rule. A few proponents of regulation, to their credit, recognize that the proposed rules are too broad because they would prohibit beneficial practices such as caching and interconnection at points that would allow more efficient delivery of content, and thus urge the Commission to modify them appropriately.<sup>225</sup>

But the leaders of the pro-regulation pack continue to exhibit a stubborn refusal to consider reasonable alternative proposals, defending the proposed rules as written and complaining that a prohibition on “unreasonable discrimination” would result in too “weak” a rule.<sup>226</sup> Such parties fail to explain why broadband Internet access service providers should be subject to a standard that bans *reasonable* conduct and that leapfrogs the substantive requirements of Title II. Indeed, they purport to appreciate the need to “provide flexibility” while prohibiting “harmful anti-competitive behavior.”<sup>227</sup> Yet the PIC parties support the broad prohibition on all discrimination, despite advising the Commission to “distinguish between

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<sup>224</sup> TWC Comments at 58-62.

<sup>225</sup> See, e.g., Amazon Comments at 2 (urging the Commission to adopt “no harm” language in the proposed rules, which would “allow broadband Internet access service providers to favor some content so long as no harm is done to other content”); Center for Democracy & Technology Comments at 24 (arguing that practices such as caching and interconnection should not fall within the scope of the nondiscrimination requirement).

<sup>226</sup> Open Internet Coalition Comments at 16-17; Free Press Comments at 79-80.

<sup>227</sup> Free Press Comments at 76 n.120; see also *id.* at 75 (stating that if the rules are defined properly, “the proposed rule language will protect consumers, competitors, and innovators from harmful behavior, while allowing flexibility for network operators to engage in behavior that may violate the rule yet do so in service of public interest purposes, without undermining the essential public interest protections”); Google Comments at 58 (“The nondiscrimination rule should be focused on preventing competitive harms or harm to users.”).

beneficial and harmful discrimination”<sup>228</sup> That is precisely what the “unreasonable discrimination” standard would do; the current nondiscrimination requirement would go well beyond that goal. And while Free Press asserts that a rule prohibiting only “unreasonable discrimination” is too ambiguous to be effectively enforced,<sup>229</sup> TWC has explained that there already is an ample body of precedent to provide guidance—in contrast to the nondiscrimination rules that Free Press and its allies prefer, which is so vague and broad that broadband Internet access service providers could have no way of knowing whether they are within the boundaries of the law until they are notified of the violation.<sup>230</sup> Any rule that is premised on the view that some forms of discrimination are beneficial but then proceeds to prohibit all of it simply to avoid the need for line-drawing would be patently arbitrary and capricious.

In addition to ignoring the impediments that net neutrality regulation poses for investment, some parties have made the untenable claim that such regulation would somehow *encourage* broadband investment.<sup>231</sup> As a matter of common sense, it is impossible to see—unless, perhaps, one views the issue through the lens of Free Press’s looking glass—how the introduction of sweeping and vague prohibitions on even beneficial discrimination, increased restrictions on network management, extensive upstream disclosure requirements, and possible further requirements such as BOC-like structural separation could conceivably make it *easier* (or more desirable) for broadband Internet access service providers to invest in their networks. Free Press’s argument seems to be that by limiting the ability of such entities to engage in “discrimination,” they will be forced to upgrade their networks to create more capacity to handle

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<sup>228</sup> PIC Comments at 44-45.

<sup>229</sup> Free Press Comments at 79.

<sup>230</sup> TWC Comments at 61.

<sup>231</sup> Free Press Comments at 28.

ever-increasing amounts of traffic.<sup>232</sup> But Free Press fails to recognize that a regulatory regime that would only permit network congestion to be addressed through increased spending would harm consumers by making the costs of broadband Internet access service prohibitively expensive for many of them and by preventing providers from adequately dealing with protocols that are designed to use all available capacity.

Of course, the main point of these parties is that the proposed rules will stimulate investment at the edge of the network—but even that claim is misguided. TWC has explained that those rules would invalidate practices that would otherwise lower barriers for new entrants in the broadband arena. For example, fee-based service enhancements offered by broadband Internet access service providers could, if not prohibited by net neutrality regulation, serve as an efficient alternative for smaller entities unable to create their own costly network facilities, hire CDNs, or compete with more entrenched providers that have their own private “fast lanes.”<sup>233</sup> This type of consensual arrangement with broadband Internet access service providers would enable smaller entities or new entrants to compete with dominant providers like Google, which has already established enormous structural advantages through its vast transmission network and distributed servers; it would also put pricing pressure on the dominant CDNs that exist today.<sup>234</sup> In this regard, Google’s claim of “extremely high entry barriers” that “auger for a

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<sup>232</sup> *Id.* at 84.

<sup>233</sup> TWC Comments at 55.

<sup>234</sup> George Ou Comments at 3 (“[B]roadband providers are trying to get into the CDN market as well. . . . The nice thing about having the broadband providers compete in the CDN market is that it puts pricing pressure on the few dominant CDN providers like Limelight and Akamai.”); *id.* at 4 (explaining that “paid peering” services that allow direct peering with the broadband network would allow application and service providers to pay less—\$1-\$3/Mbps instead of \$3-\$9/Mbps—but that prohibiting broadband Internet access service providers from offering such services would give Google “more leverage to negotiate free peering agreements with the few ISPs that are holding out for Paid

government role” is quite disingenuous.<sup>235</sup> By urging the Commission to prohibit broadband Internet access service providers from developing offerings that would allow entities without Google-like resources to compete, Google seeks to preserve and erect new entry barriers that would allow it to maintain its *own* dominant position—shutting out any would-be Googles, contrary to the goals reflected in the National Broadband Plan.<sup>236</sup> Ironically, the PIC parties fear a “two-tier Internet” in which “[l]arge, established and well-funded Internet application providers will operate at a high speed, while local, startup providers will languish in the ‘slow lane.’”<sup>237</sup> But they seem to be ignorant of the fact that Google, Akamai, and others have already created—and benefit from—that very construct.

TWC and others have explained that any rules that limit broadband Internet access service providers from continuing to make such investments would have a significant impact on the Internet as a whole. As the National Broadband Plan recognizes, such entities have been leaders in investing in and expanding broadband capabilities and services.<sup>238</sup> TWC, for example, has invested more than \$25 billion of private capital in its business since 1996; it has been providing broadband-based services to residential and enterprise customers for over a decade and

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Peering agreements, and it would simultaneously restrain their smaller competitors in the [content, application, and service] provider market who can’t possibly negotiate free peering deals which would ensure Google’s dominance”).

<sup>235</sup> Google Comments at 18-19.

<sup>236</sup> See, e.g., National Broadband Plan at 4 (stating the goal of “ensur[ing] that the next great companies, technologies and applications are developed in the United States”); *id.* at 109 (describing goal of removing barriers to competitive entry); *id.* at 91 (stating that the Commission should work to create “opportunities for new entrants to participate in the industry, including women and members of minority groups”).

<sup>237</sup> PIC Comments at 51.

<sup>238</sup> See, e.g., National Broadband Plan at 18 (stating that the ten largest network owners have combined annual capital investments “in excess of \$50 billion”); *id.* at xi (“Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly.”); see also TWC Comments at 8-10 (describing industry investments).

is one of the country's largest providers of broadband Internet access, with nearly 9 million subscribers and a variety of service options.<sup>239</sup> TWC continues to increase the speed of its broadband Internet access service and to expand Internet access to more customers, both urban and rural.<sup>240</sup> Such efforts should be encouraged, not chilled as they would be under the proposed rules.

## **2. The Proposed Rules Would Prevent Broadband Internet Access Service Providers From Introducing Planned and Unanticipated Service Offerings.**

In addition to their negative impact on investment, the proposed rules would severely curtail the ability of broadband Internet access service providers to offer new services to compete with those already present in the marketplace. Google appears to object to that outcome in its joint filing with Verizon, stating that “[a]n open Internet is one in which no central authority can impose rules that limit or prescribe the services that are being made available, where an entrepreneur with a big idea can launch his or her service online with a potential audience of billions, and where anyone, including network providers, are able to innovate without permission and provide any applications or services of their choosing, either on their own or in collaboration with others.”<sup>241</sup> But when it strikes out on its own, Google joins other parties in supporting rules that would not afford such providers any flexibility to provide other services; any flexibility that they would extend would be limited to allowing permitting reasonable (albeit severely circumscribed) network management, and perhaps, permitting compliance with certain legal

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<sup>239</sup> TWC Comments at 6-7.

<sup>240</sup> *Id.* at 6-8.

<sup>241</sup> Verizon/Google Letter at 2; *see also id.* at 8 (“Google and Verizon acknowledge that broadband network providers, in addition to offering traditional Internet access services, should have the ability to offer consumers additional service options over their broadband facilities.”).

obligations.<sup>242</sup> In the course of supporting that argument, they again betray an unjustified preference for some providers’ prioritization over others. For example, the PIC parties state that any service that provides third-party purchasers with “a ‘fast lane’” for their traffic is “never reasonable,” since it necessarily involves degrading someone else’s packets.<sup>243</sup> The Open Internet Coalition, meanwhile, deems such practices categorically “inefficient.”<sup>244</sup> But as discussed, Google, Akamai, and some others who favor regulation of broadband Internet access services providers have built entire business models on the type of practice that their allies in the fight for regulation condemn.

Free Press’s primary assertion is that broadband Internet access service providers have not identified any business models that they would be unable to pursue if the proposed rules were adopted—the implication being that there is nothing at stake for them.<sup>245</sup> According to Free Press, the required showing would be substantial—it asks the Commission to assume the role of a *de facto* investment analyst and decide not only whether such providers have advanced “viable” proposals for new services, but whether those plans will succeed from a financial perspective.<sup>246</sup> As an initial matter, this argument reflects how the pro-regulation faction has absolved itself of any burden to show that rules are necessary and instead shifts the responsibility to broadband Internet access service providers to show that they are *not* necessary. Again, this is not how policymaking works under the APA and established precedent.

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<sup>242</sup> PIC Comments at 71; Free Press Comments at 74.

<sup>243</sup> PIC Comments at 50.

<sup>244</sup> Open Internet Coalition Comments at 31.

<sup>245</sup> Free Press Comments at 12.

<sup>246</sup> *Id.* at 16 (“The Commission’s analysis must start with a basic question: what is it exactly the ISPs are proposing to do in a non-net neutral world to raise additional revenues? Then the Commission must ask: are these proposals viable, and what is the potential size of new revenues?”).

As flawed as Free Press's approach to the matter is, it ultimately is irrelevant because a number of broadband Internet access service providers *have* discussed plans that they are examining and would consider pursuing in the absence of regulation. For example, such providers are exploring offering family-friendly walled-garden services and other specialized aggregations of content and services designed to appeal to particular groups or individuals.<sup>247</sup> As noted above, Apple has been remarkably successful with offerings that restrict access to particular types of content while offering other product and service benefits to consumers, and there is no reason why broadband Internet access service providers should be flatly barred from experimenting with optional offerings of their own that seek to achieve a similar balance. Moreover, there are several other practices in which broadband Internet access service providers might seek to engage, such as caching and other fee-based service enhancements that are already being offered by other entities in the Internet ecosystem.<sup>248</sup> In this respect, companies such as Akamai, Limelight, and Google would likely be surprised by Free Press's assertion that such offerings are "hypothetical" and suffer "from many logical and practical flaws that render the pursuit of such models questionable at best."<sup>249</sup> If such practices are permissible (and viable) for these entities, there is no reason why broadband Internet access service providers should not be allowed to offer them as well and, indeed, such providers might be more interested and better positioned than these other established entities to promote competition by start-ups that could challenge them. Thus, far from limiting competition at the edge, such practices, if not blocked by new regulation, could actually help to spur that competition.

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<sup>247</sup> See, e.g., TWC Comments at 45-46.

<sup>248</sup> See, e.g., AT&T Comments at 63-78 (identifying and discussing various service enhancements, including CDN services and security screening).

<sup>249</sup> Free Press Comments at 18.

A number of broadband Internet access service providers have described such plans in their comments. For example, Verizon comments upon the new business or pricing models and differentiated services that would only be possible absent the proposed regulations.<sup>250</sup> Verizon notes the benefits that would be received by smaller application and content providers from services or platforms, such as application stores and caching services, offered by broadband Internet access service providers.<sup>251</sup> AT&T lists several currently existing and future network practices that are beneficial to consumers and serve the Commission's stated goals, but whose validity would be doubtful under the proposed rules.<sup>252</sup> These include quality of service enhancements sold to enterprise customers, CDN collocation, IP multicast arrangements, paid peering by content providers directly with broadband networks, and VPNs.<sup>253</sup> Many of these practices benefit consumers and lessen congestion on the Internet. Yet, were broadband Internet access service providers to engage in these practices, they might well be acting in violation of the proposed rules. Just as other entities are able to innovate and develop new business models to meet changing demands on the Internet, so too must broadband Internet access service providers be able to do so. Indeed, it was innovation at the network "layer"—the creation of broadband itself (which is an ongoing process)—that made possible all the other innovation that followed.

### **3. The Proposed Rules Would Frustrate Efforts to Promote Broadband Adoption and Would Widen the Digital Divide.**

Many commenters note the undeniable existence of challenges relating to broadband adoption. These have been well documented elsewhere, and the evidence of the problem continues to mount. A number of parties thus have urged the Commission to avoid doing

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<sup>250</sup> Verizon Comments at 55.

<sup>251</sup> *Id.*

<sup>252</sup> AT&T Comments at 111-12.

<sup>253</sup> *Id.*

anything that might increase the costs of broadband or otherwise make it more difficult or less appealing for consumers to adopt it,<sup>254</sup> and a core component of the National Broadband Plan is to promote “inclusion” through expanded availability as well as increased adoption and utilization.<sup>255</sup> But some of these same parties simultaneously urge the Commission to adopt the proposed rules, overlooking that they would reinforce some of the most frequently cited reasons for why consumers do not take advantage of the broadband options available to them—such as by limiting pricing and service options, reducing network investment, increasing costs and prices, and reducing service quality, as TWC and many others have discussed.<sup>256</sup> In other words, these commenters seek to preserve an open Internet while ensuring that many consumers cannot or will not take advantage of it.

Although it hardly requires emphasizing, it is widely understood that broadband adoption remains a significant problem for many consumers—a point recently reinforced by the OBI working paper devoted to that topic, the National Broadband Plan, and other studies.<sup>257</sup> Consistent with that observation, nearly every party commenting on behalf of historically disadvantaged stakeholders, and particularly lower-income populations, expresses concern about

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<sup>254</sup> See, e.g., Google Comments at 10; Comments of Public Knowledge *et al.*, GN Docket No. 09-51, at 6 (filed June 8, 2009) (“[W]e must ensure that every American has not merely the opportunity to subscribe to broadband access service, but has meaningful access that includes both consideration of affordability and training and equipment to use broadband connectivity to its full potential.”).

<sup>255</sup> See generally National Broadband Plan at 127-85.

<sup>256</sup> TWC Comments at 33-34.

<sup>257</sup> John B. Horrigan, *Broadband Adoption and Use in America*, OBI Working Paper Series No. 1, Federal Communications Commission (Feb. 2010) (“OBI Study”); National Broadband Plan at 129 (stating that “racial and ethnic minorities . . . are less likely to have broadband at home”); Joint Center for Political and Economic Studies, *National Minority Broadband Adoption: Comparative Trends in Adoption, Acceptance and Use* (Feb. 2010) (describing trends in broadband adoption by minorities and noting continuing problems, particularly among lower-income populations).

the impact the proposed rules would have on the ability of their constituencies to adopt broadband and the likelihood that they will do so.<sup>258</sup> They explain that such regulation would impede broadband deployment and thus diminish the expansion of broadband capabilities, reducing opportunities for minority-owned businesses to grow and succeed and for individuals to access broadband's many benefits, while risking unemployment among these same populations. They caution against adopting rules that would create a permanent digital underclass, and they urge the Commission not to adopt the proposed rules and to focus instead on making broadband

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<sup>258</sup> See, e.g., Coalition of Minority Chambers of Commerce Comments at 1 (opposing the proposed regulations “for the stifling effect they could have on the introduction and development of innovative broadband-based products and services that would help minority-owned businesses grow”); National Black Chamber of Commerce Comments at 1-2 (urging the Commission not to impose “new and burdensome net neutrality rules that could negatively affect minority owned businesses” and to instead “focus on bringing broadband to every home and business in the country”); National Organizations (Minority Media and Telecommunications Council) Comments at 4-12, 14 (pointing to substantial evidence of the digital divide and the significant costs it imposes upon minorities, and arguing based on that evidence against implementation of the proposed rules, which “could, among other things, increase the price of broadband for minorities, reduce the quality or availability of broadband offerings, impede the infrastructure investments necessary to fully bridge the digital divide, and limit job growth”); Hispanic Leadership Fund Comments at 1 (“We believe that imposing regulatory constraints on Internet services, in a misguided effort to correct vaguely defined problems that do not pose a significant risk to consumers or businesses, could slow the growth of broadband technology and negatively impact the Hispanic American community and internet users in general.”); Hispanic Technology and Telecommunications Partnership Comments at 2 (urging the Commission to explore the impact of the proposed regulations on unserved and underserved communities because “the regulations could reduce broadband adoption for minorities, stifle efforts to bridge the digital divide and unintentionally perpetuate or widen the social and economic disparities that affect minorities”); Latinos in Information Sciences and Technology Association Comments at 1-2 (noting the ten percent increase in Internet use among Latino adults in the past two years and the range of benefits broadband access can provide to unserved and underserved communities, but expressing doubt that the proposed regulations will advance the goal of making the Internet more accessible and affordable).

more accessible and affordable—consistent with the goals underlying the Recovery Act and the National Broadband Plan.<sup>259</sup>

Free Press purports to appreciate the value of such concerns but then tries in vain to assure the Commission that they are wrong.<sup>260</sup> One component of the argument is the assertion, rebutted above, that net neutrality regulation would not impact investment and deployment.<sup>261</sup> Another component is the unfounded belief that broadband Internet access service providers, despite a long history of investing in their networks, offering innovative services, and reducing prices, will in the absence of rules suddenly reverse course and focus their attention only on “affluent” consumers while retaining as much profit as possible.<sup>262</sup> There is no basis for this assertion as a matter of economic theory, empirical evidence, or demonstrated practice. First, every broadband Internet access service provider faces a downward sloping demand curve and thus must target more price-sensitive customers in order to maximize profits. The imposition of rules that make it more expensive to do so—for example, by forbidding arrangements that offload costs upstream—would make it *less* likely that price-sensitive customers are served. As experience has shown, it is by maximizing the use of the network, such as by offering hundreds of programming channels in addition to retransmitted broadcast signals, that cable operators have been able to grow and compete. And as noted above, broadband Internet access service providers have incentives to maximize the use of their networks in order to enhance their value.

The cable industry continues to respond in innovative ways to the challenge of expanding broadband adoption. TWC and others have formed the Digital Adoption Coalition, intended to

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<sup>259</sup> See, e.g., National Broadband Plan at 9-10.

<sup>260</sup> PIC Comments at 19; Google Comments at 10 (providing overview of goals to ensure affordable and accessible broadband).

<sup>261</sup> Free Press Comments at 67.

<sup>262</sup> *Id.*

help increase broadband adoption among low-income populations by providing discounted broadband service and computers, as well as digital literacy training, in conjunction with the U.S. Department of Housing and Urban Development.<sup>263</sup> The same goals were reflected in the cable industry's earlier announcement of its Adoption Plus (A+) program, a nationwide public-private partnership intended to promote broadband adoption among middle school-aged children in low-income households that do not currently receive broadband service.<sup>264</sup> More generally, far from writing off underserved populations as Free Press claims, cable operators and other broadband Internet access service providers have consistently advocated the critical need to pursue supply-side and demand-side initiatives for the benefit of such consumers and have made clear their intent to play an important role in that process.<sup>265</sup>

The proposed rules would complicate efforts to address obstacles to broadband adoption effectively. One factor cited as posing challenges for broadband adoption is affordability.<sup>266</sup> TWC has explained that it has sought to address this issue by offering plans to meet different needs and budgets, and it has succeeded in reducing the prices of its broadband Internet access services over time—consistent with more general trends in the marketplace.<sup>267</sup> Although some parties use this opportunity to repeat their frequent and incorrect complaint that broadband prices

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<sup>263</sup> See Kim Hart, *Coalition aims to close digital divide for HUD households*, THE HILL, Mar. 23, 2010, at <http://thehill.com/blogs/hillicon-valley/technology/88655-coalition-aims-to-close-digital-divide-for-hud-households>.

<sup>264</sup> See generally, e.g., Comments of the National Cable & Telecommunications Association, NBP Public Notice #16, GN Docket Nos. 09-137 *et al.* (filed Dec. 1, 2009) (describing Adoption Plus program).

<sup>265</sup> See, e.g., *id.* at 2; Comments of Time Warner Cable Inc., GN Docket No. 09-51, at 17-22 (filed June 8, 2009) (discussing the need to pursue supply-side initiatives in underserved areas and demand-side initiatives for underserved populations).

<sup>266</sup> National Broadband Plan at 168.

<sup>267</sup> TWC Comments at 11 (citing DOJ findings of declining prices, and describing steady declines in the entry-level price for TWC's broadband Internet access service).

already are far too high,<sup>268</sup> there should be no dispute that any actions that risk *increasing* prices should be avoided. Indeed, Google has elsewhere opposed broadband regulation on this very ground, urging the Commission to avoid actions that would “increase the costs of broadband adoption” and noting that any steps in this regard “would be even more ironic if adopted at precisely the same time when Congress, via the Recovery Act, has tasked the FCC to develop a National Broadband Plan.”<sup>269</sup> But that is exactly what the proposed rules would do. For example, by prohibiting broadband Internet access service providers from assessing charges upstream on application and service providers, consumers would be forced to absorb those costs instead—directly impacting broadband adoption.<sup>270</sup> And as discussed below, restrictions on network management would leave network operators with no choice for managing congestion other than to undertake constant and expensive capacity upgrades, ratcheting the costs of service up all the more.<sup>271</sup>

As another example, the OBI study found that a large number of consumers believe that there is too much offensive material available online and that the Internet is too dangerous for children—perceptions that dampen adoption.<sup>272</sup> The same concern underlies the Commission’s

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<sup>268</sup> See, e.g., Free Press Comments at 70.

<sup>269</sup> Comments of Google Inc., WC Docket No. 06-122, at 3 (filed Sept. 9, 2009) (opposing the application of state universal service fees to nomadic VoIP providers).

<sup>270</sup> Net Neutrality Regulation: The Economic Evidence at 20-21 (“To the extent the [nondiscrimination] rule prohibits broadband ISPs from levying positive fees on upstream customers such as content providers, the upshot would be to raise prices to downstream subscribers and ultimately reduce broadband adoption—precisely the opposite of what the Commission is seeking to accomplish through its National Broadband Plan.”). Meanwhile, Google would continue to be permitted to subsidize its “free” services to end users through its charges to enterprise customers and others.

<sup>271</sup> See *infra* Section III.C.1.

<sup>272</sup> OBI Study at 4, 6 (noting that among non-adopters, 65 percent of consumers agreed that there is too much pornography and offensive material online, and 46 percent agreed that

ongoing inquiry concerning the challenges presented for children by the evolving electronic media landscape; in that context, the Commission has specifically asked about ways to enhance online safety as well as digital literacy among children.<sup>273</sup> And the importance of empowering parents in the face of these online dangers is a critical component of the National Broadband Plan.<sup>274</sup> As discussed above, TWC is examining solutions in the form of family-friendly service offerings that would exclude such offensive content and achieve these goals, but the proposed rules might prevent TWC from moving forward with those plans—leaving in place this particular impediment to broadband adoption. At a time when the Commission is committed to promoting broadband adoption, no legitimate case can be made for regulatory actions that would tie the hands of the companies whose investments and innovation will be critical to achieving that objective.

**B. There Is Widespread Agreement That Managed Services Should Fall Outside the Scope of Any Rules.**

The emerging class of “managed services” is a prime example of the type of innovation that is on the horizon. Although the NPRM is not entirely clear as to what this class of services includes,<sup>275</sup> there is a widespread understanding that it should include broadband-based services that are sold and marketed separately from best-efforts broadband Internet access services and

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the Internet is too dangerous for children, compared to 56 and 24 percent, respectively, for consumers who use broadband).

<sup>273</sup> See generally *Empowering Parents and Protecting Children in an Evolving Media Landscape*, Notice of Inquiry, MB Docket No. 09-194 (rel. Oct. 23, 2009).

<sup>274</sup> National Broadband Plan at 57; see also Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, *Digital Opportunity: A Broadband Plan for Children and Families*, National Museum of American History, Washington, D.C., Mar. 12, 2010, at 2, 5-6 (stating that “empowering parents is an essential strategy in this area” and that promoting digital safety is a central aspect of the National Broadband Plan).

<sup>275</sup> See NPRM ¶¶ 148-53.

that do not touch the public Internet.<sup>276</sup> Such offerings could include IP-enabled video delivery, facilities-based VoIP services, specialized telemedicine applications, and offerings focused on particular groups, such as seniors or children.<sup>277</sup>

There is a widespread consensus—among all factions in the net neutrality debate—that such services need not be encompassed by the proposed rules.<sup>278</sup> TWC and others have explained that managed services do not implicate the concerns underlying the NPRM because these services are not purchased with the aim of providing undifferentiated access to the public Internet.<sup>279</sup> The NPRM’s supporters generally appear to agree that as long as managed services do not interfere with other broadband Internet access services, no rules are necessary to govern them.<sup>280</sup> Additionally, many parties observe that managed services are already subject to other

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<sup>276</sup> See, e.g., TWC Comments at 103; Center for Democracy & Technology Comments at 46; Alcatel-Lucent Comments at 11; Clearwire Corporation Comments at 14; PIC Comments at 33-34.

<sup>277</sup> See, e.g., NPRM ¶¶ 148, 150.

<sup>278</sup> See, e.g., Alcatel-Lucent Comments at 12; Alliance for Telecommunications Industry Solutions Comments at 5; Center for Democracy & Technology Comments at 47; Clearwire Corporation Comments at 13; Verizon Comments at 77; AT&T Comments at 7; Free Press Comments at 104. There are some differences of opinion concerning how the Commission should exclude managed services from the rules’ scope. Compare, e.g., AT&T Comments at 7 (the Commission should adopt a definition of “broadband Internet access” that clearly excludes offerings that would be considered “managed services”), with Clearwire Corporation Comments at 14 (the Commission could adopt a specific definition of managed services and exempt from the rules anything that falls within that definition), and Verizon Comments at 80 (opposing a comprehensive and current definition of managed services as futile, given the broad variety of services currently offered and the likely evolution and expansion of services in the near future).

<sup>279</sup> TWC Comments at 104; Verizon Comments at 79. As an example, VoIP services used by enterprise customers utilize public IP addresses, but are private IP services that allow the customer the flexibility to control the priority and security afforded their traffic; an enterprise customer purchases these services precisely because they allow for such management.

<sup>280</sup> See, e.g., PIC Comments at 34-35.

regulatory regimes, such that no duplicative regulation is necessary.<sup>281</sup> Further, TWC has explained that the Commission’s authority to regulate managed services in this proceeding is even less certain than its authority to regulate the traditional broadband Internet access services that would be covered by the rules.<sup>282</sup>

To a large extent, the arguments offered by the NPRM’s supporters on the topic of managed services represent the converse of their positions on the proposed rules more generally. For example, those parties that assert that the Commission has “broad authority to regulate communications in the public interest” do not even try to include managed services within that sweeping jurisdiction.<sup>283</sup> And while these same parties urge the Commission to intervene now to address a range of supposedly nefarious motives harbored by broadband Internet access service providers—whether to protect their own services, to marginalize low-income consumers, or to buttress their own balance sheets, as discussed above—they do not urge the Commission to take any action with respect to managed services.

Critically, in contrast to their dismissive attitude concerning the extent to which the proposed rules will impede investment and innovation with respect to the public Internet, some proponents of regulation recognize that subjecting managed services to these same requirements would be harmful. Google, for example, states that the Commission’s “chief challenge here is to allow broadband providers to offer certain non-Internet access services in ways that do not

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<sup>281</sup> TWC Comments at 104-05; Free Press Comments at 105. Free Press makes the curious claim that managed services as a whole will “still” be subject to the Commission’s *Computer Inquiry* rules, at least to the extent they are not considered “broadband Internet access services.” Free Press Comments at 107. Whatever the merits of that claim may be in other contexts, it is certainly not true with respect to managed services offered over cable networks, which have never been subject to that regime.

<sup>282</sup> TWC Comments at 104.

<sup>283</sup> Google Comments at 84.

detract from incentives to continue providing open and robust broadband Internet access,” and acknowledges that permitting such services without net neutrality regulation would “heighten[] incentives to invest in broadband infrastructure generally.”<sup>284</sup> The Center for Democracy and Technology, also a proponent of the proposed rules, recognizes that managed or specialized services are distinct from the public Internet and, while still in the early stages of development, have the potential to provide a wide range of benefits.<sup>285</sup> It further notes that separate classification of managed services provides an avenue for network operators to experiment with a range of service offerings that might otherwise be unfeasible for network operators to offer on the public Internet for technical or business model reasons.<sup>286</sup> These arguments are all correct, but they are not limited to so-called managed services—they apply to broadband services generally.

Despite appearing to agree that such services need not be encompassed within the scope of the proposed rules, some parties state that the Commission should collect more information from broadband Internet access service providers about existing and future managed services and should consider addressing the regulatory treatment of these services in a separate proceeding.<sup>287</sup> Certainly, to the extent the Commission might ever be inclined to subject these services to net

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<sup>284</sup> *Id.* at 74-75.

<sup>285</sup> Center for Democracy & Technology Comments at 47-48 (describing numerous examples of the benefits of managed services, including guaranteed highly secure connectivity between branch offices of a large business, highly reliable telemedicine transmissions between medical facilities that could permit remote participation in real-time medical procedures, provision of a speedy link for consumers to download or stream HD movies, and fully reliable two-way communications between a patient’s home medical devices and the hospital facilities where those devices could be remotely monitored and calibrated).

<sup>286</sup> Center for Democracy & Technology Comments at 47.

<sup>287</sup> Google Comments at 76-77; Akamai Comments at 18; Free Press Comments at 111; PIC Comments at 32.

neutrality regulation, it would have to develop a much more complete record to support that result, including by initiating additional rounds of notice and comment in the future. But in the meantime, TWC expects that the Commission will develop a sufficient record in this proceeding to justify leaving these services outside the scope of any rules, and it should be clear about that outcome. If the Commission adopts rules without clearly stating that “managed services” remain unregulated, it would only produce uncertainty and confusion concerning how the proposed rules may apply and thus impede the development of these services—which even some proponents of regulation recognize would be harmful.

The hesitancy of some parties to support an exception in the proposed rules for managed services—despite their apparent support for the concept in principle—appears to arise from a concern about managed services “borrowing” bandwidth from the public Internet and essentially overtaking broadband facilities as a result of providers’ desire to increase their profits from these non-public services.<sup>288</sup> These parties suggest that creating an exception for managed services, at least in the near-term, would create a loophole that would allow network providers to circumvent the rules by creating more managed or specialized services at the expense of others.<sup>289</sup> But as discussed, broadband Internet access service providers have no interest in reducing the value of services that utilize the public Internet, and cannot reasonably be expected to sacrifice that core business in favor of offering more managed services.

Similar concerns underlie suggestions for various restrictions to be placed on managed services, including a ban on bundling them with broadband Internet access services, periodic reports of bandwidth allocation to monitor whether there is any interference with other

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<sup>288</sup> PIC Comments at 33-34; Free Press Comments at 105.

<sup>289</sup> Center for Democracy & Technology Comments at 48; Free Press Comments at 111; Vonage Comments at 27.

broadband Internet access services, and, far more troubling, a requirement that broadband Internet access service providers obtain Commission approval for each managed service they want to provide on a case-by-case basis.<sup>290</sup> Such proposals should be non-starters. Most parties recognize that “managed services” such as those suggested above are likely to become drivers of innovation and investment in broadband network deployment and upgrades, as competing broadband Internet access service providers attempt to differentiate themselves in a competitive market.<sup>291</sup> Therefore, allowing managed services to evolve and to flourish, rather than subjecting them to regulation now or in the future, will lead to more—not less—total available bandwidth and upgraded facilities.

**C. The Proposed Rules Should Embrace and Not Undermine the Widely Appreciated Value of Reasonable Network Management.**

There continues to be broad theoretical agreement that broadband Internet access service providers must be able to engage in reasonable network management in order to protect the public, best-efforts Internet from commonly understood harms.<sup>292</sup> The need for such

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<sup>290</sup> PIC Comments at 35 (“Approval of a ‘managed service’ should be determined by the Commission on a case-by-case basis, with a requirement that an ISP disclose how the service functions, allocated capacity for the managed service and any impact the service will have on Internet traffic on the ISP’s network.”); Center for Democracy & Technology Comments at 49.

<sup>291</sup> United States Telecom Association Comments at 54; Motorola Comments at 14; Alcatel-Lucent Comments at 20.

<sup>292</sup> *See, e.g.*, PIC Comments at 35 (“The proposed exceptions for Reasonable Network Management acknowledge the necessity for network providers to engage in practices that ensure the proper operation of networks.”); Google Comments at 68 (“The rules should embrace reasonable network management . . . .”); Free Press Comments at 82 (“[E]stablishing a clear and meaningful standard, centered around the Commission’s statutory mandate of promoting the public interest in the provision of communications services, is essential to all of the protections sought by the Commission in the *Notice*.”); Sony Comments at 7 (supporting “the need for reasonable network management”); Vonage Comments at 24 (“Vonage believes that the definition [of reasonable network management] proposed by the Commission will further the Commission’s goals of

management is particularly pressing given the ongoing increase in the amount of Internet traffic, a trend that the National Broadband Plan notes as well.<sup>293</sup> That consensus breaks down, however, over the scope of permissible practices and the procedures that will apply to them. TWC and others have explained that any rules must provide broadband Internet access service providers sufficient flexibility to manage traffic on their networks in a manner that will optimize performance.<sup>294</sup> The NPRM made some progress toward that end, and TWC proposed modifications to that proposal to ensure the requisite level of certainty and predictability.<sup>295</sup> But the NPRM's supporters generally lean in the other direction, proposing changes to the rules that would make network management less effective and more difficult.

**1. If the Commission Imposes Rules, It Should Define Reasonable Network Management Clearly and Broadly To Provide Flexibility and Guidance to Broadband Internet Access Service Providers.**

Many parties on both sides of the debate agree that the NPRM's proposed definition of reasonable network management is not entirely workable, as its circularity—defining as “reasonable network management” those practices that are themselves “reasonable”—leaves

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promoting innovation and competition and protect consumers' interests.”); Center for Democracy & Technology Comments at 38 (agreeing generally with the Commission's proposed approach to reasonable network management).

<sup>293</sup> National Broadband Plan at 16 (noting increased broadband use, and stating that this “consumption varies significantly across user types,” with average Internet users consuming 9 gigabytes of data per month and “some heavy users consuming upwards of 1,000 GB or more each month”); *see also* TWC Comments at 16-17 (noting increased volumes of Internet traffic, as well as the increased stratification of bandwidth utilization).

<sup>294</sup> TWC Comments at 69; *see also, e.g.*, Net Neutrality Regulation: The Economic Evidence at 23 (“Regulations that limit the ability of broadband providers to engage in such network management, without producing compensating benefits, would reduce economic efficiency and consumer welfare.”).

<sup>295</sup> TWC Comments at 69-73.

much uncertainty as to what practices would be permissible.<sup>296</sup> The differences arise, predictably, concerning the direction in which that uncertainty should be resolved. Some parties that profess to appreciate the value of network management propose to define the concept so narrowly that they would prevent broadband Internet access service providers from undertaking such techniques even when they are necessary to avoid congestion and produce other benefits.<sup>297</sup> In fact, they would strip the proposed definition of the little clarity that it does provide, primarily by eliminating some or all of the specific categories of permitted conduct as well as the “catch-all” provision wisely intended to capture techniques that cannot yet be anticipated.<sup>298</sup> As TWC and others have explained, such a rule would unnecessarily curtail beneficial network management techniques without any sort of safety valve to address techniques and challenges that cannot yet be anticipated.<sup>299</sup>

These parties further argue that broadband Internet access service providers should be required to justify the reasonableness of each of their network management techniques, whether through a *post hoc* enforcement process or before the practices are implemented.<sup>300</sup> The PIC parties and Free Press urge the Commission to institute the type of two-pronged, strict scrutiny

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<sup>296</sup> See, e.g., Free Press Comments at 82; TWC Comments at 69-70; Net Neutrality Regulation: The Economic Evidence at 23.

<sup>297</sup> PIC Comments at v-vi (proposing that the Commission narrow the definition of reasonable network management “to its technical origins”).

<sup>298</sup> See, e.g., Google Comments at 73-74 (proposing a “narrowly tailored” conception of reasonable network management that is tied largely to engineering concerns and that would exclude any allowance for quality-of-service concerns as well as any sort of catch-all like that proposed in the NPRM).

<sup>299</sup> See TWC Comments at 72.

<sup>300</sup> Google Comments 69-70, 73-74 (recommending that the Commission adopt a system of *prior approval* for any reasonable network management practices that fall outside certain limiting principles); see also NPRM ¶ 137.

test that the NPRM wisely rejects.<sup>301</sup> These regimes are a far cry from the “innovation without permission” model that these same parties claim to cherish and that the Commission has long promoted and has endorsed in the NPRM and the National Broadband Plan.<sup>302</sup> A system of prior approval—even if pursuant to an “expedited” process, as Google suggests<sup>303</sup>—would delay and deter implementation of tools that provide significant benefits to online users, while creating a substantial, ongoing workload for the Commission. Indeed, as noted, broadband is a highly capital-intensive business that demands billions of dollars and substantial effort to sustain and grow it. There would be little reason to commit resources on that scale in the face of uncertainty concerning whether proposed business plans are unlawful, and where any business decision comes with a risk of being second-guessed by regulators after the fact. Further, the fact that these burdens would be imposed only on broadband Internet access service providers raises the same concerns that caused the D.C. Circuit to invalidate the preapproval requirement the Commission initially imposed on VoIP providers (but not wireless providers) in connection with traffic studies that serve as the basis for their universal service contributions.<sup>304</sup>

Such procedures would undercut the recognized need for flexibility in the area of network management. As the NPRM and many commenters recognize, such flexibility is necessary to allow network operators to experiment and innovate as user needs, usage patterns,

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<sup>301</sup> PIC Comments at 35; Free Press Comments at 83.

<sup>302</sup> National Broadband Plan at 58 (stating that an “open Internet” is one in which “inventors and entrepreneurs ‘do not require the securing of permission’ to innovate”) (quoting NPRM ¶ 4).

<sup>303</sup> Google Comments at 73-74 (arguing that the Commission should eliminate the exception for “other” network management practices “and establish a process, such as an expedited declaratory ruling or waiver process, by which providers may seek prior permission to engage in otherwise discriminatory network management practices that do not fall within the enumerated exceptions to the rules”).

<sup>304</sup> *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1243-44 (D.C. Cir. 2007).

and technology change (often rapidly) over time.<sup>305</sup> As explained in TWC’s opening comments, it is impossible to predict the array of customized services consumers will demand in the future or the innovative new tools that will be developed to serve consumers’ interests,<sup>306</sup> but it is certain that their success will depend upon a broad and flexible reasonable network management standard that does not require affirmative justification of such practices by broadband Internet access service providers.

The concerns that appear to motivate such proposals—for example, that reasonable network management will be used as a substitute for expanding capacity,<sup>307</sup> or the danger of an exception-swallowing rule<sup>308</sup>—are misplaced. First, broadband Internet access service providers have significant economic incentives to continue to expand capacity *in addition* to engaging in reasonable network management and have been investing heavily to do just that, as the National Broadband Plan and various commenters point out.<sup>309</sup> Network management is necessary because network upgrades *alone* are insufficient to keep pace with the enormous growth of Internet traffic.<sup>310</sup> Free Press tries to counter this point by claiming that broadband Internet access service providers can financially afford to undertake seemingly limitless upgrades, based in part on its view that doing so is “quite inexpensive” (misattributing a quote to TWC in the

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<sup>305</sup> NPRM ¶ 140; *see also, e.g.*, Verizon Comments at 82 (arguing that providers must be able to act dynamically and quickly in response to new and evolving challenges and security threats affecting Internet users’ experience).

<sup>306</sup> TWC Comments at 73.

<sup>307</sup> PIC Comments at 40; Free Press Comments at 42-43.

<sup>308</sup> PIC Comments at 36.

<sup>309</sup> National Broadband Plan at 38 (“Indeed, competition appears to have induced broadband providers to invest in network upgrades.”); *see also, e.g.*, TWC Comments at 7; Verizon Comments at 18; AT&T Comments at 5.

<sup>310</sup> TWC Comments at 66-67.

process).<sup>311</sup> However Free Press may measure the fiscal burden, TWC has noted that billions of dollars have been and will be spent on network upgrades one way or the other.<sup>312</sup> If network operators are left without other options for addressing congestion problems, they will be forced to spend even more on such upgrades, leading to higher prices for consumers.<sup>313</sup> What Free Press fails to grasp is that the traffic that primarily causes congestion problems—such as that from P2P applications, which is generated by a small number of users—soaks up *all* bandwidth.<sup>314</sup> Reasonable network management techniques will allow broadband Internet access service providers to address that traffic to prevent harm to the vast majority of consumers whose online experience would otherwise be impaired. Despite the populist stance that it purports to be taking, Free Press, by seeking to limit those practices, would allow the needs of a few users to compromise those of the rest of the population.

Concerns about a reasonable network management exception to the rules serving as a hideout for prohibited discriminatory practices are likewise unfounded. As discussed above, there is no reason to fear such practices in the first place. If the Commission remains inclined to adopt rules, it can preserve network management without putting its rules at risk simply by modifying the rules as TWC has proposed—for example, limiting restrictions to manifestly anti-

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<sup>311</sup> Free Press Comments at 42-43 (citing and mischaracterizing a cable roundtable discussion regarding node splitting).

<sup>312</sup> TWC Comments at 17.

<sup>313</sup> See Cisco Comments at 10 (noting estimates that requiring broadband Internet access service providers to rely on network upgrades alone to address capacity issues would increase the cost of service between \$100 and \$400 per subscriber per month).

<sup>314</sup> TWC Comments at 16-18. Congress recently proposed addressing the particular nature of P2P applications through special legislation that would place limits on government employees' use of such applications. See Secure Federal File Sharing Act, H.R. 4098, 111th Cong., 2d Sess. (Mar. 11, 2010).

competitive conduct.<sup>315</sup> Whatever the approach, the Commission must give broadband Internet access service providers wide latitude to manage their networks in ways that benefit consumers and the Internet ecosystem as a whole.

## **2. Overly Burdensome Disclosure Requirements Would Diminish the Effectiveness of Reasonable Network Management Tools.**

Some commenters propose an additional limitation on reasonable network management in seeking greatly increased disclosure requirements that likewise are intended to serve as a prerequisite to the introduction and use of any new techniques. As a general matter, there is broad agreement regarding the importance and value of transparency. TWC and other broadband Internet access service providers make it a point to provide consumers with a wealth of detailed information today, including with respect to their “acceptable use” and “network management” policies.<sup>316</sup> These practices—which have become commonplace in the absence of regulation—have been documented on various occasions in this and parallel proceedings, including during a recent Workshop on Consumers, Transparency and the Open Internet.<sup>317</sup> Moreover, service providers are constantly working on ways to improve their disclosure practices to make sure that their customers stay informed; TWC has expressed support for the adoption of best practices that

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<sup>315</sup> TWC Comments at 71-72.

<sup>316</sup> *Id.* at 98-99 (discussing the clear and conspicuous disclosures already made to consumers by TWC and other broadband Internet access service providers); AT&T Comments at 189 (describing the numerous consumer disclosures already made by AT&T and others in the absence of regulation); Cox Comments at 8 (enumerating the clear disclosures made to consumers in Cox’s Acceptable Use Policy and elsewhere).

<sup>317</sup> FCC Workshop: Consumers, Transparency, and the Open Internet, Jan. 19, 2010, <http://www.openinternet.gov/workshops/consumers-transparency-and-the-open-internet.html>.

would facilitate this process,<sup>318</sup> and even Google—which as discussed below argues for further disclosures—endorses this approach.<sup>319</sup>

In light of these considerations, there is no need for additional disclosure requirements for consumers as some parties have proposed.<sup>320</sup> Free Press tries to show otherwise on the basis of a compilation of the terms of service, subscriber agreements, and acceptable use policies for several broadband Internet access service providers, including TWC's.<sup>321</sup> As TWC has explained, however, Free Press's complaint is really aimed at the *substance* of acceptable use policies, not the level of transparency.<sup>322</sup> Indeed, Free Press's objections arise from the fact that broadband Internet access service providers already make detailed disclosures to their customers.

Some parties support the NPRM's ill-conceived proposal that broadband Internet access service providers be required to share information with “upstream” providers of applications and content, and even add additional requirements to the list.<sup>323</sup> They contend that broadband Internet access service providers should regularly report a wide variety of information, including

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<sup>318</sup> TWC Comments at 98-99.

<sup>319</sup> Google Comments at 67 (“Google believes that the creation of industry best practices and standards can greatly enhance transparency.”).

<sup>320</sup> TWC Comments at 98-99; AT&T Comments at 188-90 (“[P]roviders on their own are doing precisely what the Commission might hope to achieve by regulatory fiat—they are disclosing relevant information to their consumers in clear and comprehensive terms.”); Verizon Comments at 132 (“[M]andated disclosures are not needed to provide the appropriate incentives. Broadband access providers need to have a reputation for treating customers fairly in order to compete successfully, and part of maintaining that reputation is to make meaningful disclosures about practices and terms that are important to consumers.”); Rural Cellular Association Comments at 24 (arguing in favor of voluntary industry codes and standards instead of government regulation to achieve compliance with the transparency principle).

<sup>321</sup> Free Press Comments, App. B at 165.

<sup>322</sup> See Reply Comments of Time Warner Cable Inc., CG Docket No. 09-158, at 6 (filed Oct. 28, 2009) (“TWC Consumer Disclosure Reply Comments”) (rebutting a similar substance-based argument masked as a complaint regarding sufficiency of disclosures).

<sup>323</sup> Free Press Comments at 112-17; Google Comments at 65-67; PIC Comments at 66.

information concerning traffic prioritization, traffic blocking or throttling, processes to address traffic congestion, any content or message examination processes, traffic routing processes based on sender or receiver or type of traffic, and actual transmission and capacity rates.<sup>324</sup> But the consumer disclosures discussed above already ensure that this information is available to upstream providers. For example, the PIC parties, despite arguing for more disclosure, note that tools already are available that provide information on actual transmission speeds.<sup>325</sup> To the extent there are disputes concerning such disclosures, they should be addressed in connection with the National Broadband Plan, where these issues have already been raised.<sup>326</sup> Google as well as the Open Internet Coalition also recommend that any changes in practice by the broadband Internet access service provider be preceded by supplemental disclosure at least thirty days prior to their implementation.<sup>327</sup> But such a requirement would have the same effect as the preapproval requirements discussed above, unnecessarily delaying benefits to online users.

As explained in TWC's opening comments, such an overly burdensome disclosure regime would be not only unnecessary but harmful.<sup>328</sup> There exists a very real risk of hackers, spammers, terrorists, and other bad actors disrupting online services, and it is essential that service providers be able to develop the most advanced and cutting-edge tools to prevent such

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<sup>324</sup> Google Comments at 65-67; Center for Democracy & Technology Comments at 36; PIC Comments at 66-67.

<sup>325</sup> PIC Comments at 67-68.

<sup>326</sup> For example, the Commission now has a full record showing that it is difficult to convey meaningful information about "actual" transmission speeds because of the number of variables involved, many of which are beyond the service provider's control. *See* TWC Consumer Disclosure Reply Comments at 3-4; TWC Broadband Plan Reply Comments at 5 (citing Comments of Time Warner Cable Inc., GN Docket No. 09-40, at 8-9 (filed Apr. 13, 2009)).

<sup>327</sup> Google Comments at 65-67; Open Internet Coalition Comments at 90.

<sup>328</sup> TWC Comments at 101-02.

disruption. For such tools to succeed, disclosures as to the precise techniques involved must necessarily be circumscribed. TWC agrees with the Commission that *consumers* should receive clear information about the network management practices in place—and, in fact, they already do—but the level of technical detail that some parties contemplate here would be counterproductive. Given that there is near-universal agreement that reasonable network management is necessary to protect against such harms, it follows that any transparency requirement adopted by the Commission should be tailored to further this consensus goal and should not hinder broadband Internet access service providers from engaging in valuable network management practices.<sup>329</sup>

Finally, if the Commission ultimately determines that more disclosure would be a good thing, then there is no basis for limiting additional obligations to broadband Internet access service providers alone. In touting the value of transparency, Google and others fail to explain why any new requirements should apply only to one subset of the entities that affect the Internet experience. Google claims that upstream disclosures are necessary because application developers rely on such information when designing and investing in their applications and would otherwise be precluded from designing applications that work properly on broadband infrastructure.<sup>330</sup> But that rationale applies equally to imposing such requirements upon all

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<sup>329</sup> *Id.* (discussing the potential harms of an overly burdensome transparency requirement and noting that additional upstream disclosure requirements would be superfluous); Verizon Comments at 132 (opposing mandated detailed disclosure); AT&T Comments at 190 (same), 191-93 (disputing any need for upstream disclosures to content and application providers), 194-95 (describing the tension between successful network management and mandated disclosure); Internet Freedom Coalition Comments at 3 (warning of potential risks related to making network management practices transparent not only to the general public, but also to the individuals and organizations that are attempting to abuse and attack the networks).

<sup>330</sup> Google Comments at 66-67.

entities in the Internet ecosystem.<sup>331</sup> Consumers would benefit from increased information related to the consequences and conditions that apply to their use of various applications and services, but much of this information is not held by broadband Internet access service providers.<sup>332</sup> For example, the rules used by Google in prioritizing its paid and non-paid search results or the degradation of simultaneously run services caused by bandwidth-intensive applications like P2P have as great an effect on a consumer's Internet experience as do a broadband Internet access service provider's network management practices.<sup>333</sup> Therefore, to the extent the Commission imposes any disclosure requirements, it should make clear that these requirements apply not just to broadband Internet access service providers, but also to other entities in the Internet ecosystem.

## CONCLUSION

TWC continues to believe that the need to preserve investment, innovation, and experimentation in a rapidly changing marketplace counsels strongly against adopting any rules at this time; the opening comments submitted in support of the rules contain nothing to compel a contrary conclusion. Nevertheless, TWC remains committed to working with the Commission and relevant stakeholders in connection with this critical endeavor.

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<sup>331</sup> TWC Comments at 99-100; *see also* AT&T Comments at 195; Verizon Comments at 134; Cox Comments at 11-12.

<sup>332</sup> TWC Comments at 99.

<sup>333</sup> *Id.* at 99-100; AT&T Comments at 195.

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